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No. 92-243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAVE OUR CUMBERLAND MOUNTAINS, INC.,
Petitioner,

v.

MANUEL LUJAN, Secretary,
UNITED STATES DEPARTMENT OF INTERIOR, *et al.*,

and

NATIONAL COAL ASSOCIATION and
AMERICAN MINING CONGRESS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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November 16, 1992

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QUESTION PRESENTED

Whether section 520(c)(1) of the Surface Mining Control and Reclamation Act ("SMCRA" or "the Act"), 30 U.S.C. § 1270(c)(1) (1988), which provides that certain actions are to be brought where surface coal mining operations are located, applies to citizen suits brought against the Secretary of the United States Department of the Interior and the Director of the Office of Surface Mining Reclamation and Enforcement under section 520(a)(2) of the Act, 30 U.S.C. § 1270(a)(2) (1988), for failure on a nationwide level to perform mandatory duties under the Act?

PARTIES TO THE PROCEEDING

Petitioner, plaintiff in the district court and appellee in the court of appeals, is Save Our Cumberland Mountains, Inc. ("SOCM").* Respondents are Manuel Lujan, Secretary of the United States Department of the Interior, and Harry Snyder, Director of the Office of Surface Mining Reclamation and Enforcement, (collectively "the Secretary"), in their official capacities, who were defendants in the district court and appellees in the court of appeals. National Coal Association and American Mining Congress, intervenors-appellants in the court of appeals, are also respondents.

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* SOCM has no parent companies or subsidiaries.

The Council of Southern Mountains, Inc. ("CSM") was also a plaintiff in the district court and an appellee in the court of appeals, but is no longer in existence and, therefore, is not a party to this proceeding.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	8
I. THE COURT OF APPEALS' DECISION HAS THE EFFECT OF ABOLISHING PATTERN AND PRACTICE SUITS	9
II. THE CIRCUIT COURT DECISION WILL IMPOSE AN INCREDIBLE BURDEN ON THE FEDERAL COURTS AND RESULT IN A SIGNIFICANT WASTE OF SCARCE JUDICIAL RESOURCES	14
III. THIS CASE IS IMPORTANT TO THE ENVIRONMENTAL WELFARE OF THIS COUNTRY	16
CONCLUSION	17

TABLE OF AUTHORITIES

CASES	Page
Alaska Ctr. for the Env't v. Reilly, 762 F. Supp. 1422 (W.D. Wash. 1991)	10,15
American Lung Ass'n v. Reilly, 962 F.2d 258 (2d Cir. 1992)	10,15
Environmental Defense Fund, Inc. v. Costle, 636 F.2d 1229 (D.C. Cir. 1980)	10
Environmental Defense Fund, Inc. v. Thomas, 870 F.2d 892 (2d Cir.), *cert. denied*, 493 U.S. 991 (1989)	10
Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990)	11
National Black Police Ass'n v. Velde, 712 F.2d 569 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 963 (1984)	10
National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982)	10
Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975)	10
Save Our Cumberland Mountains, Inc. v. Clark, 725 F.2d 1434 (D.C. Cir. 1984) (vacated)	2,5
Save Our Cumberland Mountains, Inc. v. Clark, 22 Env't Rep. Cas. (BNA) 1217 (D.D.C. Jan. 31, 1985)	2,5
Save Our Cumberland Mountains, Inc. v. Lujan, 963 F.2d 1541 (D.C. Cir. 1992)	*passim*
Save Our Cumberland Mountains, Inc. v. Lujan, 21 Envtl. L. Rep. (Envtl. L. Inst.) 20,121 (D.D.C. Sept. 5, 1990)	2,6
Save Our Cumberland Mountains, Inc. v. Watt, 550 F. Supp. 979 (D.D.C. 1982)	2,5
Save Our Cumberland Mountains, Inc. v. Watt, 18 Env't Rep. Cas. (BNA) 1821 (D.D.C. Dec. 29, 1982)	2,5

Table of Authorities Continued

	Page
United States v. Federal Communications Comm'n, 652 F.2d 72 (D.C. Cir. 1980)	10
Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990)	11,12
STATUTES AND REGULATIONS	
28 U.S.C. § 1254(1) (1988)	3
28 U.S.C. § 1331 (1988)	4
28 U.S.C. § 1337 (1988)	4
28 U.S.C. § 1361 (1988)	4
28 U.S.C. § 1391(b) (1988)	5
28 U.S.C. § 2201 (1988)	4
28 U.S.C. § 2202 (1988)	4
30 U.S.C. § 1260(c) (1988)	4
30 U.S.C. § 1268(e) (1988)	4
30 U.S.C. § 1268(f) (1988)	4
30 U.S.C. § 1268(h) (1988)	4
30 U.S.C. § 1270 (1988)	3,12
30 U.S.C. § 1270(a)(1) (1988)	7
30 U.S.C. § 1270(a)(2) (1988)	*passim*
30 U.S.C. § 1270(c)(1) (1988)	*passim*
30 U.S.C. § 1271(a)(1) (1988)	3,4
30 U.S.C. § 1271(a)(3) (1988)	4
30 U.S.C. § 1271(a)(4) (1988)	4
30 U.S.C. § 1271(c) (1988)	4
33 U.S.C. § 1365 (1988)	12
33 U.S.C. § 1365(c)(1) (1988)	16
42 U.S.C. § 7604 (1988)	11
42 U.S.C. § 7604(c)(1) (1988)	15
30 C.F.R. § 723.15(b)(2) (1992)	4

Table of Authorities Continued

Page

LEGISLATIVE MATERIALS

H.R. Rep. No. 218, 95th Cong., 1st Sess. 88-89 (1977) 9

MISCELLANEOUS

Department of the Interior News Release, January 24, 1990. 17

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NATIONAL COAL ASSOCIATION and
AMERICAN MINING CONGRESS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOCM hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 963 F.2d 1541, 60 U.S.L.W. 2755, 34 Env't Rep. Cas. (BNA) 1876, 295 U.S. App. D.C. 374, 22 Envtl. L.

Rep. (Envtl. L. Inst.) 21,179 (D.C. Cir. May 22, 1992), and is reprinted in the Appendix hereto at 1a-22a.[1] The opinion of the district court is reported at 21 Envtl. L Rep. (Envtl. L. Inst.) 20,121 (D.D.C. Sept. 5, 1990), and is reprinted in the Appendix at 23a-32a.

This case was previously in both the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The earlier district court opinion is reported at 550 F. Supp. 979, 18 Env't Rep. Cas. (BNA) 1817, 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,284 (D.D.C. Sept. 30, 1982), and is reprinted in the Appendix at 33a-41a. The order denying reconsideration is reported at 18 Env't Rep. Cas. (BNA) 1821, 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,531 (D.D.C. Dec. 29, 1982), and is reprinted in the Appendix at 42a-45a. The earlier opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 725 F.2d 1434, 20 Env't Rep. Cas. (BNA) 1315, 233 U.S. App. D.C. 328, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,205 (D.C. Cir. Jan. 20, 1984), and is reprinted in the Appendix at 46a-53a. The district court's consent order approving the parties' 1984 settlement agreement is reported at 22 Env't Rep. Cas. (BNA) 1217 (D.D.C. Jan. 31, 1985).[2]

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on

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[1] References to the Appendix to this Petition are cited herein as "App. at ___a."

[2] There are also a number of opinions and orders regarding the award of attorneys' fees in this case. Those opinions and orders are not relevant to this Petition.

May 22, 1992. Rehearing and rehearing *en banc* were denied on August 18, 1992. App. at 54a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTE INVOLVED

The relevant statutory provision is 30 U.S.C. § 1270 (1988), which is reprinted in the Appendix at 55a-57a.

STATEMENT OF THE CASE

This case commenced in 1981 when two Appalachian-based nonprofit environmental organizations, SOCM and CSM,[3] filed suit in the United States District Court for the District of Columbia charging the Secretary with the wholesale nationwide failure to perform certain mandatory duties to enforce provisions of the Act. Specifically, SOCM charged that, in over 700 instances nationwide, the Secretary had failed to impose mandatory civil penalties and to take appropriate enforcement actions against surface coal mine operators who had been found to be in violation of SMCRA.[4] Jurisdiction for the case was founded on

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[3] SOCM and CSM are referred to collectively as SOCM when discussing the earlier proceedings in this case.

[4] SMCRA's regulatory scheme imposes the following mandatory duties:

> (1) When the Office of Surface Mining Reclamation and Enforcement ("OSM") has reason to believe that a surface coal mine operator is acting in violation of the Act, *e.g.*, operating without a permit, OSM *must* notify the state regulatory authority, if one exists. 30 U.S.C. § 1271(a)(1) (1988).
>
> (2) If none exists or the state authority fails to act, OSM

section 520(a)(2) of the Act, the citizen suit provision of SMCRA, 30 U.S.C. § 1270(a)(2), as well as on 28 U.S.C. §§ 1331, 1337, 1361, 2201, and 2202 (1988) (federal question, commerce regulation, mandamus, and declaratory judgment provisions).

The Secretary filed a motion to dismiss the complaint on the ground, *inter alia*, that section 520(c)(1) of SMCRA, 30 U.S.C. § 1270(c)(1), required that the case be brought only in a district in which a surface coal mining operation complained of is located and no such mining operations exist in the District of Columbia. On September 30, 1982, the district court denied the Secretary's motion to dismiss, holding that section 520(c)(1) is not jurisdictional, but rather is a

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must conduct an inspection. *Id.*

(3) If a violation is confirmed, OSM *must* issue a notice prescribing a reasonable time to abate the violation. 30 U.S.C. § 1271(a)(3) (1988).

(4) If the violation persists, OSM *must* order an immediate cessation of operations. *Id.*

(5) Once a cessation order is issued, OSM *must* assess a civil penalty against the mine of at least $750 per day for up to 30 days. 30 U.S.C. § 1268(h) (1988); 30 C.F.R. § 723.15(b)(2) (1992).

(6) If after 30 days the violation still persists, OSM *must* take appropriate alternative enforcement action, which includes criminal prosecution, proceedings to hold corporate officers or agents personally liable for civil penalties, proceedings to suspend or revoke an operator's permit, and proceedings to obtain injunctive relief. *See* 30 U.S.C. § 1268(e), (f) (1988); 30 U.S.C. § 1271(a)(4), (c) (1988).

(7) OSM *must* withhold the grant of a permit to any applicant who owns or controls a surface coal mine that is operating in violation of the Act. 30 U.S.C. § 1260(c) (1988).

waivable venue provision designed for the convenience of the litigants. App. at 34a-35a. The district court explained that SOCM was "challeng[ing] a purported national policy under the Act, not 700 individual decisions involving particular coal mining operations," App. at 35a, and that, as such, "the facts of each violative operation are not relevant." App. at 36a, n.1. Because SOCM was challenging a nationwide policy of the Secretary, rather than specific site violations, the district court determined that the case was properly brought in the District of Columbia pursuant to the general venue statute, 28 U.S.C. § 1391(b) (1988), as the place where the claim arose. App. at 36a.

On December 29, 1982, the district court denied reconsideration, App. at 42a-45a, and the Secretary then appealed the decision. The court of appeals reversed the district court, holding that section 520(c)(1) governs citizen suits brought pursuant to section 520(a)(2) and, therefore, SOCM's lawsuit could not be maintained in the District of Columbia where no surface coal mines are located. App. at 52a.

On April 2, 1984, the court of appeals granted rehearing *en banc* and *sua sponte* vacated the panel's decision. Prior to the rehearing, on November 6, 1984, at the request of the parties, the court of appeals *en banc* remanded the case to the district court for proceedings consistent with the settlement reached by the parties. On January 31, 1985, the district court entered the parties' settlement agreement as a consent order. *SOCM v. Clark*, 22 Env't Rep. Cas. (BNA) 1217. The consent order required the Secretary, *inter alia*, to implement the Applicant/Violator System ("AVS"), a nationwide computer enforcement system

used to check permit applicants and permit holders for unabated violations and unpaid civil penalties. The consent order also required that the Secretary deny or rescind a permit (and to instruct state regulatory authorities to do likewise) if a permit applicant or permit holder were found to be linked to an unabated violation or unpaid civil penalty, pending an acceptable abatement plan or payment schedule. The consent order was to terminate on January 31, 1990, unless the district court found the Secretary to be in substantial, systemic non-compliance with its terms.

In April 1989, SOCM moved the district court for an order finding the Secretary in substantial, systemic non-compliance with the consent order and holding the Secretary in contempt. The parties once again pursued settlement and in January 1990 asked the district court to approve their second settlement agreement ("the 1990 Settlement Agreement"). The 1990 Settlement Agreement was designed to enhance the AVS and to improve the Secretary's performance in detecting and remedying violations of SMCRA.

In December 1989, on the eve of the 1990 Settlement Agreement between SOCM and the Secretary, the National Coal Association and the American Mining Congress (collectively "NCA/AMC") for the first time sought to intervene in the action and were granted limited intervention solely for the purpose of addressing the provisions of the 1990 Settlement Agreement which NCA/AMC believed were not in accordance with SMCRA and its implementing regulations. On September 5, 1990, after briefing and over the objections of NCA/AMC, the district court approved the 1990 Settlement Agreement as "lawful and reasonable." App. at 24a.

NCA/AMC appealed the approval of the 1990 Settlement Agreement arguing, *inter alia*, that due to section 520(c)(1) the district court lacked jurisdiction over the case. In response to a motion by NCA/AMC in the court of appeals to vacate the September 5, 1990 approval order for lack of jurisdiction, the Secretary took the position that jurisdiction had been proper in the district court. In his brief on the merits, however, the Secretary reversed himself and joined NCA/AMC in arguing that the September 5, 1990 order approving the 1990 Settlement Agreement should be vacated for lack of jurisdiction.

SOCM opposed NCA/AMC's motion to vacate, arguing that Congress did not intend for section 520(c)(1) to apply to suits brought against the Secretary under section 520(a)(2) for "failure . . . to perform any act or duty . . . which is not discretionary." 30 U.S.C. § 1270(a)(2). Rather, section 520(c)(1) applies only to suits brought under section 520(a)(1), 30 U.S.C. § 1270(a)(1) (1988), against anyone "alleged to be in violation of the" Act.[5] On May 22, 1992, the court of appeals entered its decision holding that, although the statutory construction question is "close,"

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[5] For example, section 520(c)(1) reads "[A]ny action respecting a *violation* of this chapter or the regulations thereunder may be brought only in . . . ." 30 U.S.C. § 1270(c)(1) (emphasis added). This language plainly refers to section (a)(1) suits respecting violations at particular mines. If Congress had intended section 520(c)(1) to apply to suits brought under section 520(a)(2) as well, section 520(c)(1) would read: "[A]ny action *under this section* may be brought only in . . . ." Moreover, the phrase "*the* surface coal mining operation complained of" in section 520(c)(1), 30 U.S.C. § 1270(c)(1) (emphasis added), has no application in the context of a nationwide policy not to perform a mandatory duty.

section 520(c)(1) is a special nonwaivable forum rule that applies to citizen suits brought under section 520(a)(2). App. at 21a. The court vacated the September 5, 1990 order approving the 1990 Settlement Agreement and remanded the case to the district court for entry of an order dismissing the case without prejudice. App. at 22a. SOCM filed a petition for rehearing and suggestion for rehearing *en banc*, which were denied on August 18, 1992. App. at 54a.

REASONS FOR GRANTING THE PETITION

This case merits review because the District of Columbia Circuit's decision destroys nationwide pattern and practice suits that have been routinely approved and resolved by the federal courts for years. As a consequence, when applied to citizen suits under SMCRA and other major federal environmental statutes, this decision will result in a massive waste of judicial resources and will severely overburden the federal courts in a manner Congress did not intend in enacting the citizen suit provision. If the circuit court decision is allowed to stand, the same case alleging nationwide noncompliance with mandatory duties and raising only legal issues will have to be brought piecemeal—not just in every state, but in every federal district, in which a surface coal mine operation is located. Thus, what was once one lawsuit will become a multitude of duplicative lawsuits across the country, all raising the same issues and requesting the same relief, with each one consuming scarce judicial resources. But that is not the end. When the other major environmental statutes are taken into account, the decision will result in a disastrous number of lawsuits across the nation, causing an incredible and unnecessary waste of judicial resources.

Furthermore, this case involves one of the principal remedial statutes enacted by Congress to restore and preserve our nation's environment. Its importance cannot be minimized. For these reasons, it is imperative that the Supreme Court grant this petition for certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit in this case.

I.

THE COURT OF APPEALS' DECISION HAS THE EFFECT OF ABOLISHING PATTERN AND PRACTICE SUITS.

This case concerns section 520(a)(2) of SMCRA, the citizen suit provision providing for actions against the Secretary for failure to perform a mandatory act or duty under the Act. Congress has included citizen suit provisions in numerous statutes, including all the major environmental statutes, for the express purpose of encouraging citizens to act as private attorneys general to compel the persons charged with enforcing the statutes to comply with their mandatory statutory duties. As Congress stated with regard to SMCRA:

> [P]roviding citizens access to . . . the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the act.

H.R. Rep. No. 218, 95th Cong., 1st Sess. 88-89 (1977).

For years, the federal courts have recognized the intent of Congress in these citizen suit provisions to provide for nationwide pattern and practice lawsuits when there is a systemic, wholesale enforcement failure under one of these remedial statutes. *See, e.g.*,

American Lung Ass'n v. Reilly, 962 F.2d 258 (2d Cir. 1992) (Clean Air Act citizen suit brought to compel Environmental Protection Agency Administrator to perform nondiscretionary duty concerning national ambient air quality standards for ozone); *Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422 (W.D. Wash. 1991) (Clean Water Act citizen suit brought to compel Environmental Protection Agency Administrator to perform mandatory acts to promulgate water pollution limits); *Environmental Defense Fund, Inc. v. Thomas*, 870 F.2d 892 (2d Cir.) (Clean Air Act citizen suit brought to compel Environmental Protection Agency Administrator to take formal action regarding national ambient air quality standards for sulphur oxides), *cert. denied*, 493 U.S. 991 (1989); *National Black Police Ass'n v. Velde*, 712 F.2d 569 (D.C. Cir. 1983) (challenge to Law Enforcement Assistance Administration's policy of nonenforcement of Title VI of the Civil Rights Act), *cert. denied*, 466 U.S. 963 (1984); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (Clean Water Act citizen suit brought to compel Environmental Protection Agency Administrator to perform mandatory duty to enforce act with regard to hundreds of dams throughout the country); *United States v. Federal Communications Comm'n*, 652 F.2d 72 (D.C. Cir. 1980) (challenge to failure of Federal Communications Commission to enforce the Clayton Act); *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229 (D.C. Cir. 1980) (Clean Water Act citizen suit based on failure to implement several provisions of the act); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975) (Clean Water Act citizen suit brought to compel Environmental Protection Agency Administrator to publish guidelines on effluent limitations).

Unquestionably, a major feature of these cases is that a *single* lawsuit is initiated in *one* venue to compel a regulatory authority to perform its mandatory duty in all venues covered by the statute, *i.e.*, nationwide. As this Court expressly recognized in *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3191 (1990), Congress can provide for "correction of the administrative process at a higher level of generality" than site specific adjudication where common questions of law are presented. By enacting section 520(a)(2) of SMCRA, Congress chose to allow "correction of the administrative process" whenever the Secretary failed to perform a mandatory duty imposed by SMCRA. The District of Columbia Circuit also recognized this principle in *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 752 (D.C. Cir. 1990), stating that when Congress provides a "green light," affected citizens may bring non-site specific, programmatic challenges. The Circuit cited as examples of such a "green light" the mandatory duty/citizen suit provisions of the Clean Air Act, 42 U.S.C. § 7604 (1988),[6] and the Federal Water Pollution Con-

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[6] Section 304 of the Clean Air Act, 42 U.S.C. § 7604, provides in relevant part:

> (a) . . . any person may commence a civil action on his own behalf—
>
> (1) against any person . . . who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary

trol Act ("Clean Water Act"), 33 U.S.C. § 1365 (1988),[7] which are virtually identical to the mandatory duty/citizen suit provision of SMCRA, 30 U.S.C. § 1270.[8] *Women's Equity Action League v. Cavazos*, 742 F.2d at 752, n.15.

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with the Administrator . . . .

* * *

(c)(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

[7] Section 505 of the Clean Water Act, 33 U.S.C. § 1365, provides in relevant part:

(a) . . . any citizen may commence a civil action on his own behalf—

(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

* * *

(c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

[8] Section 520 of SMCRA, 30 U.S.C. § 1270, provides in relevant part:

(a) . . . any person having an interest which is or may be

The court of appeals' decision here has effectively eliminated the section 520(a)(2) pattern and practice cause of action by requiring that such a case be brought in every judicial district where a mine is located, even though no site-specific facts are involved and the same legal issue is presented.[9] This is a result Congress did not intend in enacting the citizen suit provision in SMCRA, the Clean Air Act, the Clean Water Act, or any other of the nation's environmental statutes, and warrants review by this Court.

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adversely affected may commence a civil action on his own behalf to compel compliance with this Act—

(1) against [any person who] . . . is alleged to be in violation of the provisions of this Act or of any rule, regulation, order or permit issued pursuant thereto, or against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this title; or

(2) against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this chapter which is not discretionary with the Secretary or with the appropriate State regulatory authority.

• • •

(c)(1) Any action respecting a violation of this chapter or the regulations thereunder may be brought only in the judicial district in which the surface coal mining operation complained of is located.

[9] In short, the court of appeals has construed the section 520(c)(1) "venue" provision to be a substantive limitation on the scope of mandatory duty suits.

II.

THE CIRCUIT COURT DECISION WILL IMPOSE AN INCREDIBLE BURDEN ON THE FEDERAL COURTS AND RESULT IN A SIGNIFICANT WASTE OF SCARCE JUDICIAL RESOURCES.

The court of appeals held in this case that section 520(c)(1) of SMCRA, which provides that certain actions be brought in the judicial district where the surface coal mining operation complained of is located, applies to citizen suits brought pursuant to section 520(a)(2) of the Act, *i.e.*, suits against the Secretary for failure to perform a mandatory act or duty under the Act. App. at 21a. The result of this decision is that this one lawsuit challenging the Secretary's failure to perform his mandatory enforcement duties throughout the country will need to be brought piecemeal—in each judicial district throughout the nation where surface coal mining operations are located, each suit raising the same issue and seeking the same relief. The already overburdened federal courts will become more overburdened with these numerous identical lawsuits that could (and should) be resolved in a single action.

This litigation has been ongoing for almost twelve years. It has already occupied considerable court time and absorbed substantial judicial resources. It has been very time-consuming and expensive. With the approval of the 1990 Settlement Agreement, however, there was an end in sight to the litigation, and the prospect of nationwide enforcement of SMCRA became a real possibility. Now, however, as a consequence of the court of appeals' decision, the expenditure of time and resources to this point may prove fruitless and the substantial judicial resources

used for this lawsuit will be multiplied many-fold in order to secure the Secretary's enforcement of SMCRA throughout the country. Thus, if allowed to stand, the court of appeals' decision will result in a massive waste of judicial resources and will severely and unnecessarily tax the nation's already overburdened federal courts.

Furthermore, this decision has precedential effect, not only on citizen suits under SMCRA, but also on citizen suits under other major environmental statutes. For example, as discussed above, the citizen suit and venue provisions of the Clean Air Act and the Clean Water Act are substantially the same as the citizen suit and venue provisions of SMCRA. The citizen suit provisions of these statutes have provided the basis for pattern and practice suits in the past. *See, e.g., American Lung Ass'n v. Reilly*, 962 F.2d 258 (Clean Air Act citizen suit); *Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422 (Clean Water Act citizen suit). Using the court of appeals' decision as precedent, however, future decisions in cases under the Clean Air Act and the Clean Water Act could eliminate single venue mandatory duty suits under those statutes as well.[10] Such a result would expo-

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[10] The court of appeals incorrectly concluded that Congress intended the venue provisions in the Clean Air Act and the Clean Water Act to be limited to suits under subsection (a)(1) of the citizen suit provisions while finding the venue provision in SMCRA to apply to both subsection (a)(1) and subsection (a)(2) actions. App. at 19a. The court reached this conclusion by seizing on the different language in SMCRA concerning the *type* of violation addressed by the venue provision. The Clean Air Act venue provision addresses violations "by a stationary source of an emission standard or limitation." 42 U.S.C. § 7604(c)(1). The

nentially increase the number of duplicative lawsuits brought to compel regulatory authorities to perform mandatory duties. This would result in still more wasted judicial resources than already caused by the present decision and would cause an even greater burden on the federal courts.

The end result of this elimination of pattern and practice suits could well be a critical overload of the federal court system. The need to prevent such a drastic result presents a compelling reason for this Court to review the decision of the court of appeals in this case.

III.

THIS CASE IS IMPORTANT TO THE ENVIRONMENTAL WELFARE OF THIS COUNTRY.

The significance of this case to the public interest in restoring the environment of this country is man-

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Clean Water Act venue provision addresses violations by "a discharge source of an effluent standard or limitation." 33 U.S.C. § 1365(c)(1). The SMCRA venue provision addresses violations of the Act. 30 U.S.C. § 1270(c)(1).

The reason for the differing language in SMCRA is not as the court of appeals found—an intent by Congress to expand the scope of the venue provision; rather, it reflects the differing types of violations addressed by subsection (a)(1) actions in the three statutes. Violations of both the Clean Air Act and the Clean Water Act involve effluent limitations and standards. The venue provisions in those statutes are, therefore, written to address these violations. In contrast, SMCRA involves many differing kinds of violations, *e.g.*, revegetation, backfilling and grading, effluent limitations, post-mining land use, and thus, the language of the venue provision differs in order to ensure that all violations of the Act would be subject to subsection (a)(1) actions.

ifest. SMCRA was enacted over fifteen years ago. During that time, surface coal mines have continued to be left unreclaimed, without consequence to those responsible, because of the Secretary's policy of non-enforcement. Citizens have continued to live with the pernicious effects of unreclaimed mine sites, such as flooding, landslides and polluted streams, that SMCRA was intended to eliminate.

Congress has expressly recognized the importance of this litigation. In a continuing showing of its support, Congress has appropriated over $20 million to fund implementation of the 1985 consent decree and the 1990 Settlement Agreement. App. at 9a, n.5. This level of funding by Congress demonstrates the significance of the results achieved by SOCM and, as the court of appeals recognized, "the legislature's approval of the AVS project." App. at 17a.[11]

To allow the court of appeals' decision to stand unreviewed dooms the chances that SMCRA will be enforced, resulting in the waste of millions of taxpayer dollars, all to the detriment of the public. The public interest in the environmental welfare of this country thus mandates review by this Court before the numerous consequences of the lower court's decision are allowed to occur.

CONCLUSION

The only judicially efficient way to ensure the Secretary's *nationwide* enforcement of SMCRA is to have

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[11] Even the Department charged with failing to enforce the Act has acknowledged the benefits to be achieved by this case. For example, Manuel Lujan publicly stated that the 1990 Settlement Agreement "strengthens enforcement of the surface mining law." Department of the Interior News Release dated January 24, 1990.

one lawsuit challenging the Secretary's *nationwide* policy of nonenforcement. The court of appeals' decision forces SOCM to bring an untold number of separate lawsuits throughout the country to accomplish the same goal. This is a massive waste of judicial resources and a reversal of years of decisional law in this country. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 16, 1992

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 16, 1992 Decided May 22, 1992

No. 90-5374

SAVE OUR CUMBERLAND MOUNTAINS, INC., *ET AL.*,
PLAINTIFFS-APPELLEES,

v.

MANUEL LUJAN, SECRETARY OF THE INTERIOR, *ET AL.*,
DEFENDANTS-APPELLEES,

and

NATIONAL COAL ASSOCIATION AND AMERICAN MINING CONGRESS,
INTERVENORS-APPELLANTS.

Appeal from the United States District Court
for the District of Columbia

(C.A. No. 81-2134)

Thomas C. Means, with whom *John A. MacLeod* and *J. Michael Klise* for National Coal Association, and *Edward*

M. Green and *Stuart A. Sanderson* for American Mining Congress were on the joint brief, for appellants.

John T. Stahr, Attorney, Department of Justice, with whom *Barry M. Hartman,* Acting Assistant Attorney General, *Robert L. Klarquist,* and *Alfred T. Ghiorzi,* Attorneys, Department of Justice, were on the brief, for Federal appellees.

L. Thomas Galloway, with whom *Judith A. Mather* and *Robin H. Sangston* were on the brief, for appellees, Save Our Cumberland Mountains, Inc., *et al.*

Before RUTH B. GINSBURG, BUCKLEY and D.H. GINSBURG, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* RUTH B. GINSBURG.

GINSBURG, RUTH B., *Circuit Judge*: This case concerns the proper forum for "citizen suits" under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), 30 U.S.C. §§ 1201 *et seq.* Section 520 of the Act authorizes "any person having an interest which is or may be adversely affected" to commence a civil action to compel compliance with the Act or "any rule, regulation, order or permit" thereunder. 30 U.S.C. § 1270(a). This "citizen suit" prescription describes two categories of civil actions: (1) complaints against the United States or other governmental instrumentality for violation of the Act or any rule, regulation, order or permit issued pursuant thereto, or against any other person for violating a SMCRA-implementing rule, regulation, order or permit, SMCRA § 520(a)(1), 30 U.S.C. § 1270(a)(1);[1] (2) complaints against

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[1]Congress did not want mine operators who complied with all regulations, orders, and permits to be subject to suit where the Secretary, in permitting the operation, failed properly to implement the Act. Congress therefore limited actions against private operators to instances of violation of a "rule, regulation, order or permit." A government agency or instrumentality, however, is both regulator and, as mine operator, regulatee, and hence may be sued under SMCRA § 520(a)(1), 30 U.S.C. § 1270(a)(1), "when

the Secretary or "the appropriate State regulatory authority" for "failure . . . to perform any act or duty under [SMCRA] which is not discretionary with the [regulator]." SMCRA § 520(a)(2), 30 U.S.C. § 1270(a)(2). On the forum for "citizen suits," SMCRA § 520(c)(1) provides:

> Any action respecting a violation of this chapter or the regulations thereunder may be brought only in the judicial district in which the surface coal mining operation complained of is located.

30 U.S.C. § 1270(c)(1).

The second category of citizen civil action is at issue here. Plaintiff Save Our Cumberland Mountains, Inc. (SOCM)[2] commenced this suit pursuant to SMCRA § 520(a)(2) against the Secretary of the Interior and the Director of the Office of Surface Mining Reclamation and Enforcement (OSM) to check the government's alleged failure, nationwide, effectively to enforce the Act. SOCM sought an order, nationwide in scope, compelling the Secretary and OSM (collectively, the Secretary) to assess and collect civil penalties against cited violators and to take alternative enforcement action against operators who fail, despite notice and penalties, to abate their violations.

SOCM chose the U.S. District Court for the District of Columbia as the forum for its citizen suit. Concededly, no "surface coal mining operation . . . is located" in this judi-

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it is the operator of a coal mine and is not in compliance with the Act." Oklahoma Wildlife Fed'n v. Hodel, 642 F. Supp. 569, 571-72 (N.D. Okla. 1986) (summarizing legislative history accounting for Congress' subjecting government operators, but not private operators, to suit for operations out of compliance with the Act).

[2]As described in SOCM's certificate as to parties, SOCM "is a non-profit organization whose membership is comprised of residents of the Appalachian area who are vitally concerned about and affected by the proper regulation of surface mining." Council of the Southern Mountains, Inc., originally a co-plaintiff, is no longer in existence.

cial district. *See* SMCRA § 520(c)(1), 30 U.S.C. § 1270(c)(1). SOCM maintains, however, that the special forum rule contained in SMCRA's citizen suit provision governs only suits directed primarily against mine operators, *i.e.*, violators of the regulatory prescriptions, civil actions of the kind delineated in SMCRA § 520(a)(1). Suits against the official enforcers for failure to enforce, *i.e.*, complaints of inaction by the Secretary or "the appropriate State regulatory authority," suits of the kind delineated in SMCRA § 520(a)(2), SOCM argues, are not subject to the forum rule of SMCRA § 520(c)(1). Instead, according to SOCM, suits against the regulators to compel enforcement may be brought in the district where those regulators reside, in this case, in the nation's capital. *See* 28 U.S.C. § 1391(b), (e). Alternately, SOCM argues that the forum rule stated in SMCRA § 520(c)(1) is waivable, and that the Secretary in fact waived the limitation.

Recognizing that the statutory construction question is close, we hold that the special forum rule contained in SMCRA § 520(c)(1), 30 U.S.C. § 1270(c)(1), controls all citizen suits described in SMCRA § 520(a), 30 U.S.C. § 1270(a), and is not confined to suits directed primarily against mine operators. We further hold that the rule is not waivable. Our conclusions are consistent with precedent binding in this circuit, *New Mexico ex rel. Energy and Minerals Dep't v. U.S. Dep't of Interior*, 820 F.2d 441 (D.C. Cir. 1987), and with this fundamental consideration: courts customarily adjudicate episode- or area-specific controversies; federal judges, applying federal legislation, generally adhere to that mode of adjudication absent clear instruction from Congress — as in the case of review of rulemakings setting nationwide standards — that more encompassing action has been committed to the judges' charge.

I. Background

A. SMCRA's Regulatory Regime

SMCRA "establish[es] a nationwide program to protect society and the environment from the adverse effects of

surface coal mining operations." 30 U.S.C. § 1202(a). OSM, an office within the Department of the Interior, administers and enforces the Act. 30 U.S.C. § 1211(c). A state, by developing a SMCRA-implementation plan approved by the Secretary, may assume jurisdiction over non-federal surface coal mining operations within its borders. 30 U.S.C. § 1253. Indeed, Congress anticipated that primary responsibility for the regulation of surface mining would "rest with the States." 30 U.S.C. § 1201(f). A federally-designed program governs in states that have not put in place an acceptable implementation plan of their own. 30 U.S.C. §§ 1254(a), (b), 1271(b).[3]

SMCRA prohibits the operation of a surface mine without a permit. 30 U.S.C. § 1256. The Act instructs OSM to notify the state regulatory authority, in states that have one, when OSM has reason to believe that an operator is in violation of SMCRA or a permit. If no state authority exists, or the state fails to act, OSM must proceed with an inspection. When a violation is confirmed, OSM "shall issue" a notice prescribing a reasonable time (not exceeding 90 days) for abatement of the violation. To check violations that persist despite the notice to abate, the statute directs OSM to order an immediate cessation of operations. 30 U.S.C. § 1271(a)(1), (3).

Once a cessation order issues, OSM must assess a civil penalty against the mine of at least $750 per day. 30 U.S.C. § 1268(h). OSM regulations limit such penalties to a period of 30 days. 30 C.F.R. § 723.15(b)(2). If the violation has not been abated by then, OSM "shall take appropriate [alternative enforcement] action"; appropriate measures include criminal prosecution, proceedings to hold corporate officers or agents personally liable for civil penalties, proceedings to suspend or revoke an operator's permit, and proceedings to obtain injunctive relief. *See* 30 U.S.C. §§ 1268(e) & (f), 1271(a)(4) & (c).

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[3]The Code of Federal Regulations indicates that 24 states have state regulatory programs and 11 states have federally-implemented programs. *See* 30 C.F.R. Ch. VII, subchapter T.

A permit applicant must submit with the application a list of all SMCRA violation notices, indicating the final resolution of each notice. 30 U.S.C. § 1260(c). If any surface mine "owned or controlled by the applicant" has an unabated violation, the Act instructs OSM not to issue a permit until the applicant proves that the violation has been or is being corrected. *Id.*

B. The History of this Litigation

SOCM commenced this action in 1981 charging the Secretary with large-scale failure, throughout the nation, to enforce SMCRA. SOCM alleged that in over 700 instances, the Secretary had not followed up notices of violation with the imposition of mandatory penalties. The complaint further asserted that the Secretary had allowed hundreds of violators to continue operations, with violations unchecked, after expiration of the 30-day penalty period. Seeking court-ordered compliance by the Secretary with the Act's enforcement commands, SOCM alleged jurisdiction under SMCRA § 520(a)(2), 30 U.S.C. § 1270(a)(2) (authorizing citizen suit against Secretary for failure to perform nondiscretionary duties), as well as 28 U.S.C. §§ 1331, 1337, 1361, 2201 and 2202 (federal question, commerce regulation, mandamus, declaratory judgment provisions).

The Secretary moved to dismiss on the ground, *inter alia,* that SMCRA § 520(c)(1), 30 U.S.C. § 1270(c)(1), allowed suit "only in the judicial district in which the surface coal mining operation complained of is located." The Secretary maintained that section 520(c)(1) constituted a jurisdictional limitation. The district court denied the motion, concluding that section 520(c)(1) was not jurisdictional in character but was merely a venue provision, one designed to serve the convenience of litigants; emphasizing that SOCM "challenge[d] a purported national policy," the district court held applicable "the general venue statute, 28 U.S.C. § 1391(b), which provides venue within [the District of Columbia] as the place where the claim [against the Secretary] arose." *Save Our Cumberland*

Mountains, Inc. v. Watt, 550 F. Supp. 979, 980-81 (D.D.C. 1982).

Taking up the merits of SOCM's complaint, the district court determined that SMCRA renders mandatory the Secretary's duty to collect civil penalties and initiate alternative enforcement action. That duty, the court concluded, had not been fulfilled. Finding no issues of material fact genuinely in dispute, the court pronounced summary judgment for SOCM. *Id.* at 983. Following the entry of an order granting injunctive relief, the Secretary appealed.

Around the same time, in another case in which SOCM was a plaintiff, a different judge of the district court reached an apparently conflicting conclusion on the application and exclusivity of section 520(c) in citizen suits under section 520(a)(2); the complaint in that case challenged the Secretary's implementation of a provision of the Act, SMCRA § 528(2), 30 U.S.C. § 1278(2), exempting "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less." *Save Our Cumberland Mountains, Inc. v. Watt,* 558 F. Supp. 22 (D.D.C. 1982) (*Two-acres* case). *Two-acres* involved three claims. Two were of the "citizen suit" genre; brought under section 520(a)(2), they challenged the Secretary's failure to inspect and institute enforcement proceedings against hundreds of mining operations alleged to have improperly claimed the two-acres exemption. The third claim in *Two-acres* questioned a "rulemaking" disposition; it challenged under SMCRA § 526(a)(1), 30 U.S.C. § 1276(a)(1), the Secretary's withdrawal of a regulation interpreting the exemption. The district court, based on section 520(c)(1), dismissed the first two claims as improperly brought in the District of Columbia; it dismissed the third, although properly brought in the District, as moot.

The plaintiffs' appeal from the judgment dismissing the complaint in the *Two-acres* case was consolidated for oral argument with *the Secretary's appeal* in this case. The panel, on the same day, in two separate but closely coordi-

nated opinions, affirmed the judgment dismissing the complaint in the *Two-acres* case, and reversed the judgment against the Secretary in this case. *Save Our Cumberland Mountains, Inc. v. Clark,* 725 F.2d 1422 (*Two-acres* case), 1434 (instant case) (D.C. Cir. 1984). The appellate panel concluded that section 520(c)(1) governed all citizen suits under section 520(a) and therefore precluded suit in the District of Columbia, a district in which "[none of] the surface coal mining operation[s] complained of is located."

The court, en banc, voted to rehear the two appeals. Pending en banc review, the full court, in April 2, 1984 orders, vacated the panel judgments and opinions in both cases. A comprehensive settlement of this case, however, intercepted the scheduled en banc consideration. In line with the parties' request, on November 6, 1984, the full court remanded both cases to the district court for proceedings consistent with the settlement negotiations.

On January 31, 1985, the district court entered a consent order in the instant case setting out the terms of the parties' agreement. *Save Our Cumberland Mountains, Inc. v. Clark,* 22 Env't Rep. Cas. (BNA) 1217 (D.D.C. 1985).[4] The order provided, *inter alia,* that OSM would implement the permit blocking prescription of 30 U.S.C. § 1260(c) by establishing a computerized system capable of effectively checking permit applicants for prior violations. The system, now known as the Applicant/Violator System (AVS), would match applicants and permit holders against entities and persons answerable for unabated violations and unpaid civil penalties. OSM would call upon state regulatory authorities to deny or withdraw permits, or do so itself, pending effectuation of an abatement plan or payment schedule that met the regulator's approval. The consent order was to terminate on January 31, 1990 unless, in the interim, the court found the Secretary in "substantial, systematic non-compliance."

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[4]The *Two-acres* case was settled separately. *See* Save Our Cumberland Mountains, Inc. v. Hodel, 622 F. Supp. 1160, 1163 (D.D.C. 1985).

In April 1989, SOCM moved for an order finding the Secretary in substantial non-compliance. The parties once again pursued settlement and, in January 1990, asked the district court to approve their second agreement, terminate the consent order enforcing the first agreement, and dismiss the action with prejudice. The 1990 agreement contains various provisions designed to enhance the AVS system and to improve OSM's performance in detecting and remedying SMCRA violations.[5]

In December 1989, just as the parties neared the final text of their second agreement, mining industry trade associations National Coal Association and American Mining Congress (collectively, NCA) moved to intervene to oppose court approval of the settlement.[6] NCA urged that the district court, by reason of section 520(c)(1), had no authority to entertain the case, and that the proposed settlement was unlawful in numerous respects. The district court limited NCA's intervention "to advis[ing] the court of any aspect of the settlement agreement . . . which is not in accordance with SMCRA and the regulations

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[5]Congress has to date appropriated more than $20 million for the Secretary and the states to comply with the agreements. The latest of these is Department of the Interior and Related Agencies Appropriations Act, 1991, H.R. CONF. REP. No. 971, on H. RES. 5769, 101st Cong., 2d Sess. (1990) (funding for states to implement the second settlement agreement).

[6]Although NCA knew, contemporaneously, of the first settlement agreement and of the negotiations for the second, it delayed entering the fray because, as represented by appellate counsel, its interests were not affected by the litigation until late 1988 and early 1989, when newly promulgated rules "threatened law-abiding companies with sanctions based on violations by others." Brief of Appellants National Coal Association and American Mining Congress at 5 n.1. NCA is currently no sidelines sitter. It has filed actions under section 526(a)(1), 30 U.S.C. § 1276(a)(1), contesting the rules to which it objects. The "rules cases" have been consolidated under the caption National Wildlife Fed'n v. Lujan, No. 88-3117 (D.D.C.), and are awaiting district court decision. In addition to the "rules cases," NCA has brought an independent action, still pending in the district court, challenging the second SOCM-Secretary settlement agreement.

thereunder." Ultimately, the district court approved the settlement as "lawful and reasonable." Memorandum, C.A. No. 81-2134, at 3 (D.D.C. Sept. 5, 1990).

NCA appeals the district court's approval of the second settlement agreement, first arguing that the district court lacked jurisdiction in light of section 520(c)(1). NCA also maintains that SOCM, an Appalachian-based organization, lacks standing to bring this suit alleging nationwide failure to enforce SMCRA. *See Conservation Law Foundation of New England v. Reilly,* 950 F.2d 38 (1st Cir. 1991) (regional environmental organization lacks standing to seek nationwide injunctive relief in citizen suit under Comprehensive Environmental Response, Compensation, and Liability Act). On diverse statutory and constitutional grounds, NCA attacks the second settlement agreement as unlawful. The Secretary, reviving argument made when the litigation was new, joins NCA in urging that section 520(c)(1) is a jurisdictional impediment to the district court's order confirming the settlement. On the merits, the Secretary defends the agreement as lawful, fair, and reasonable. We hold that section 520(c)(1) precludes locating a citizen suit in a district where no mining operations occur, and therefore do not reach the question of SOCM's standing or NCA's objections to the substance of the settlement agreement.

II. Analysis

A. The Language and Structure of SMCRA's Citizen Suit Provision

As earlier described, *see supra* pp. 2-3, SMCRA § 520 authorizes suits by citizens against both mine operators, SMCRA § 520(a)(1), 30 U.S.C. § 1270(a)(1), and official enforcers, SMCRA § 520(a)(2), 30 U.S.C. § 1270(a)(2).[7] In

[7]Section 520(a), 30 U.S.C. § 1270(a), provides:

> (a) . . . any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter —

this regard, section 520 markedly resembles counterpart citizen suit provisions of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1365,[8] and the Clean Air Act, 42 U.S.C. § 7604.[9] All three Acts present first, in an

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> (1) against the United States or any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution which is alleged to be in violation of the provisions of this chapter or of any rule, regulation, order or permit issued pursuant thereto, or against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter; or
>
> (2) against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate state regulatory authority to perform any act or duty under this chapter which is not discretionary with the Secretary or with the appropriate State regulatory authority.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties.

[8]Section 505(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1365(a), provides in relevant part:

> (a) . . . any citizen may commence a civil action on his own behalf —
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

[9]Section 304(a) of the Clean Air Act Amendments of 1977, 42 U.S.C. § 7604(a), provides in relevant part:

"(a)(1)" section, authorization for suits to check unlawful operations or activities, and second, in an "(a)(2)" section, permission for suits to prompt effective law enforcement.

Each Act also contains a forum prescription, a "(c)(1)" section, but at this juncture, the provisions diverge. FWPCA and the Clean Air Act contain "(c)(1)" forum prescriptions specifically linked to unlawful operations or activities, *i.e.*, to "(a)(1)" suits. SMCRA's citizen suit forum rule, in contrast, is not similarly qualified. Thus, FWPCA § 505(c)(1) addresses actions "respecting a violation by a discharge source of an effluent standard or limitation."[10] Clean Air Act § 304(c)(1), correspondingly, addresses actions "respecting a violation by a stationary source of an emission standard or limitation."[11] SMCRA § 520(c)(1)

(a) . . . any person may commence a civil action on his own behalf —

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator . . . .

[10]FWPCA § 505(c)(1), 33 U.S.C. § 1365(c)(1), provides:

(c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

[11]Clean Air Act § 304(c)(1), 42 U.S.C. § 7604(c)(1), provides:

(c)(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

employs broader language; it encompasses, simply, "[a]ny action respecting a violation of this chapter."[12] In all three Acts, converging again, the "(c)(2)" prescriptions deal not with the forum for a citizen suit, but with the regulator's right to intervene in such an action.[13]

In urging that the instant proceedings are properly lodged in the District of Columbia, SOCM asks us to follow the lead of courts that have grappled with forum-rule issues in FWPCA and Clean Air Act citizen suits. Fastening on the close connection of the "(c)(1)" provisions of those Acts to "(a)(1)" suits against polluters, courts have allowed citizens to maintain "(a)(2)" suits against regulators (state or federal) in other places, *i.e.*, those designated by the general venue provisions of 28 U.S.C. § 1391. *See Citizens for a Better Environment v. Costle*, 515 F. Supp. 264, 277 (N.D. Ill. 1981) (Clean Air Act citizen suit against Environmental Protection Agency under 42 U.S.C. § 7604(a)(2) for failure to perform alleged mandatory duty; proper forum is determined by 28 U.S.C. § 1391(e), not by 42 U.S.C. § 7604(c)(1)); *Township of Long Beach v. City of New York*, 445 F. Supp. 1203, 1207-08 (D. N.J. 1978) ("(c)(1)" forum provision of FWPCA is applicable to "(a)(1)" actions against polluters, but does not stop recourse to Title 28 general venue provisions for "(a)(2)" suit against Administrator for failure to perform alleged non-discretionary duty). The generality of SMCRA § 520(c)(1)'s

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[12]SMCRA § 520(c)(1), 30 U.S.C. § 1270(c)(1), provides:

> (c)(1) Any action respecting a violation of this chapter or the regulations thereunder may be brought only in the judicial district in which the surface coal mining operation complained of is located.

[13]SMCRA § 520(c)(2), 30 U.S.C. § 1270(c)(2), provides: "In [an] action under this section, the Secretary, or the State regulatory authority, if not a party, may intervene as a matter of right." FWPCA § 505(c)(2), 33 U.S.C. § 1365(c)(2), provides: "In [an] action under this section, the Administrator, if not a party, may intervene as a matter of right." Clean Air Act § 304(c)(2), 42 U.S.C. § 7604(c)(2), provides, in relevant part: "In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding."

language, in contrast to the particularity of the "(c)(1)" provisions of FWPCA and the Clean Air Act, however, causes us to resist that course.

We set out again in text the words of SMCRA § 520(c)(1) because they are the prime basis for our decision:

> Any action respecting a violation of this chapter or the regulations thereunder may be brought only in the judicial district in which the surface coal mining operation complained of is located.

30 U.S.C. § 1270(c)(1). The words "this chapter" refer to the entire Act.[14] NCA, now joined by the Secretary, highlights the words "Any action," "this chapter," meaning Act, and "only." SOCM, on the other hand, stresses the words "violation" and "the surface coal mining operation complained of." Those words, SOCM maintains, reveal an intention to describe infractions by mining operators, actions of the "(a)(1)" variety, not complaints under "(a)(2)" that the Secretary has failed to perform required duties.

A panel of this court in the *Two-acres* case, 725 F.2d at 1427-29, *see supra* p. 8, considered and rejected SOCM's arguments extracted from the language Congress used. We agree with and recapitulate the panel's reasoning in *Two-acres*. The *Two-acres* opinion, we bear in mind, was vacated in anticipation of this court's en banc rehearing. We look to that opinion, accordingly, for the soundness of its reasoning and not as binding precedent. *See Christianson v. Colt Industries Operating Corp.*, 870 F.2d 1292, 1298 (7th Cir.) (although vacated, prior decision "stands as the most comprehensive source of guidance available on the . . . questions at issue in this case"), *cert. denied,* 493 U.S. 822 (1989).

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[14]As it appears in the Statutes at Large, the section reads: "Any action respecting a violation of this Act . . . ." Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 447, 503 (1977).

Preliminarily, we note, as did the *Two-acres* panel, 725 F.2d at 1427 n.14, that the language used by Congress is neither clarified nor clouded by the legislative history of the Act. Indeed, the legislative materials contain no discussion at all of SMCRA § 520(c)(1)'s forum rule.[15]

Turning to the word "violation," it is true, and hardly surprising, that the word appears several times in the Act in reference to mine operations or mine operators. *See, e.g.*, 30 U.S.C. §§ 1260(c), 1267(e), 1267(h)(1). But it is commonly understood that

> a statute is violated when one transgresses its terms. When the Secretary fails to perform a duty required by the Act, he has transgressed the Act's affirmative mandate; that is, he has "violated" the Act. The Secretary's functions and responsibilities [under SMCRA] derive solely from the Act. The Secretary's alleged failure to perform these duties can thus only be interpreted as a *violation* of the Act.

Two-Acres, 725 F.2d at 1427.

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[15]In a supplemental submission to this court, Letter dated March 16, 1992, submitted pursuant to FED. R. APP. P. 28(j), SOCM pointed out that, while the Act was moving through the Senate, the bill's § 520(c)(1) prescription first used the words "[a]ny action respecting a violation of this Act," S. 7, 95th Cong., 1st Sess. 103 (Jan. 10, 1977) (Senate bill as introduced), then switched to "[a]ny action pursuant to this section," S. REP. NO. 128, 95th Cong., 1st Sess. 35 (May 10, 1977); S. 7, 95th Cong., 1st Sess. (May 20, 1977), *reprinted in* 123 Cong. Rec. 15,793 (1977) (bill as passed by Senate). SOCM urges that, had Congress meant (c)(1) to apply to both "(a)(1)" and "(a)(2)" suits, the law as enacted would have retained the "[a]ny action pursuant to this section" formulation. We are unable to attach to the shift from "pursuant to this section" back to "violation of this Act" the large significance SOCM attributes to the change. *See* Drummond Coal Co. v. Watt, 735 F.2d 467, 474 (11th Cir. 1984 ("Unexplained changes made in committee are not reliable indicators of congressional intent."). We note, moreover, that throughout, Congress retained in (c)(1) the phrase "the surface coal mining operation complained of," which SOCM insists "makes no sense" in the context of an "(a)(2)" suit for failure to perform a mandatory duty. *See* Brief of Appellee SOCM at 16-17.

Tellingly, SOCM's complaint in this very action uses the word "violation" in relation to the Secretary's conduct as regulator. Thus, paragraph 10 refers to "defendant's violation of law, within the meaning of Section 520(b)(2) of the Act, 30 U.S.C. § 1270(b)(2)." Paragraph 19 asserts that "[d]efendants have failed . . . to collect penalties . . . in violation of . . . § 518(h) of the Act and 30 C.F.R. § 723.15." Paragraph 21 charges that "[d]efendants have repeatedly violated and continue to violate 30 C.F.R. § 723.15."

As for SMCRA § 520(c)(1)'s reference to the district "in which the surface mining operation complained of is located," we again borrow from *Two-acres*. A charge that the Secretary is failing to enforce the Act must be earthbound. To have substance, it must rest on proof that mine operators, at specific locations, are evading the terms of the Act, and are thus "adversely affect[ing]" the interests of the complaining persons. *See* 725 F.2d at 1428 ("[E]ven in the context of the Secretary's failure to perform mandatory duties, the claim at bottom is referenced to specific mining operations."); *id.* at 1437 (instant case) ("[E]ven though SOCM 'complains of' noncompliance by the Secretary, the claim is ultimately concerned with violations and abatement activities at specific mines."). In sum, we find most sensible a literal reading of SMCRA § 520 that locates "[a]ny" citizen suit in a place where offending operations are ongoing. SOCM's opposing interpretation derives no support from SMCRA's legislative history, and is not as readily fitted to the structure and language of the provision.

We have taken into account SOCM's suggestion that Congress, by repeatedly allocating funds for the Secretary's compliance with the court-entered settlement agreements, *see supra* note 5, has effectively matched SMCRA § 520(c)(1) with "(a)(1)" actions and authorized recourse to 28 U.S.C. § 1391 for "(a)(2)" suits. We do not read so much into the appropriations measures, for there is no indication that they stand for anything more than Congress' readiness to enable the Secretary to comply with court

orders and perhaps the legislature's approval of the AVS project. *Cf. Randall v. Loftsgaarden,* 478 U.S. 647, 661 (1986) (repeal of legislative prescription, in whole or in part, "by implication" is not favored).

Nor do we think that our reading of SMCRA § 520(c)(1) leaves no office for "(a)(2)" suits. Congress meant to distinguish "(a)(1)" actions against operators of mines, including both private and governmental entities, from "(a)(2)" suits against regulators, and nothing we have said obliterates that distinction. *Accord National Wildlife Fed'n v. Hodel,* 661 F. Supp. 473, 476 (E.D. Ky. 1987) (in "(a)(2)" suit, "plaintiffs are required to identify particular sites or operations in this district where [Secretary] ha[s] failed to inspect or enforce [SMCRA]"). *See also Oklahoma Wildlife Fed'n v. Hodel,* 642 F. Supp. 569 (N.D. Okla. 1986) (indicating that restrained and moderate reading of SMCRA § 520(a)(2) is in order, particularly in view of *Heckler v. Chaney,* 470 U.S. 821 (1985)).

B. SMCRA's Allocation of Rulemaking Review

As the *Two-acres* panel observed, in setting SMCRA's forum prescriptions for rulemaking review, Congress showed its "preference for local judicial review where the action potentially involves site-specific or local conditions." 725 F.2d at 1428. This preference, expressed in SMCRA § 526(a)(1), 30 U.S.C. § 1276(a)(1), informs and supports our reading of SMCRA § 520(c)(1), the citizen suit forum provision.

The Act's scheme for judicial review of rulemakings, set out in SMCRA § 526, is arranged on three territorial lines: national, state, and local. "Any action by the Secretary promulgating national rules . . . shall be subject to judicial review in the United States District Court for the District of Columbia Circuit." 30 U.S.C. § 1276(a)(1). This provision for review of rules nationwide in scope is the sole instance in which SMCRA assigns litigation to the District of Columbia. *See, e.g., National Wildlife Fed'n v. Hodel,* 839 F.2d 694 (D.C. Cir. 1988) (review of national regulations challenged in numerous respects by both envi-

ronmental groups and groups representing coal industry). "Any action of the Secretary to approve or disapprove a State program or to prepare and promulgate a Federal program [for a State] shall be subject to judicial review by the United States District Court for the District which includes the capital of the State whose program is at issue." 30 U.S.C. § 1276(a)(1). "Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located." *Id.*

The SMCRA § 526(a)(1) scheme for review of rulemakings, like the SMCRA § 520(c)(1) citizen suit forum prescription, does not provide for choice. *Cf.* 30 U.S.C. § 816(a)(1) (authorizing judicial review of agency orders under Federal Mine Safety and Health Act in circuit where violation occurred *or* in D.C. Circuit); 29 U.S.C. § 660(a) (authorizing judicial review of agency decisions under Occupational Safety and Health Act in circuit in which violation occurred, where employer's principal office is located, *or* in D.C. Circuit). Because SMCRA § 526(a)(1) is directive, not permissive, courts have said the provision sets "subject matter jurisdiction." *See Virginia ex rel. Virginia Dep't of Conservation and Economic Dev. v. Watt,* 741 F.2d 37, 40 (4th Cir. 1984), *cert. denied,* 469 U.S. 1198 (1985); *Drummond Coal Co. v. Watt,* 735 F.2d 469, 472-76 (11th Cir. 1984) (both holding that suits for judicial review of the Secretary's actions in promulgating "national rules or regulations" may be maintained only in the District Court for the District of Columbia). *See also Amerikohl Mining, Inc. v. United States,* 899 F.2d 1210, 1214-15 (Fed. Cir. 1990) (SMCRA § 526(a)(1) prescribes that national rules shall be subject to review in the District Court for the District of Columbia, and thereby excludes proceedings in Claims Court under 28 U.S.C. § 1491, the general provision for Claims Court jurisdiction over claims against United States).

C. Circuit Precedent Set in *New Mexico ex rel. Energy and Minerals Dep't v. U.S. Dep't of Interior*, 820 F.2d 441 (D.C. Cir. 1987)

This court, in *New Mexico*, analyzed SMCRA § 520(c)(1) in the same way our sister circuits analyzed SMCRA § 526(a)(1). *New Mexico* involved a claim — more precisely, a counterclaim — by the Navajo Tribe asserting that mines on certain lands in New Mexico were not subject to the state's regulatory authority under SMCRA. We held that the counterclaim, which qualified as a citizen suit under SMCRA § 520, could not be entertained in the District of Columbia, in view of SMCRA § 520(c)(1)'s directive that such a suit may be maintained *only* in the district where the mines in question are located. Concerning the character of SMCRA's citizen suit and rulemaking review forum rules, 30 U.S.C. §§ 1270(c)(1), 1276(a)(1), we said: "From time to time, Congress has selectively supplied special limitations for the adjudication of special subjects." 820 F.2d at 446. Such prescriptions, we observed, when designed to confine litigation to a particular place exclusively, for concerns weightier than the defendant's convenience, are not venue rules "with immutable tones of waiver"; rather, they "ha[ve] been equated with a limitation of subject matter jurisdiction." *Id.*

To summarize, we have rejected SOCM's argument that SMCRA § 520(c)(1), the citizen suit forum rule, applies only to actions against mine operators, not to actions against the Secretary as regulator. We also reject, for the reasons just stated, the argument that the citizen suit forum rule is waivable by the parties' conduct or consent. This action, according to SMCRA's citizen suit prescriptions, thus may be brought only where mining operations complained of are located. 30 U.S.C. § 1270(a)(2) & (c)(1).

Concerning the alleged alternate bases under Title 28 (28 U.S.C. §§ 1331, 1337, 1361) for lodging this suit in the District of Columbia, *see supra* p. 6, it suffices to recall "that even where Congress has not expressly stated that statutory jurisdiction is 'exclusive,' . . . a statute which

vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984); *see Drummond Coal Co.*, 735 F.2d at 475. Nor does the "savings clause" in SMCRA § 520(e), 30 U.S.C. § 1270(e), aid SOCM, for as the *Two-acres* panel explained, that clause preserves only rights to sue under laws other than SMCRA, and grants no right to sue under the Act to compel the Secretary to perform mandatory duties. 725 F.2d at 1429-31.

D. The Breadth of Judicial Oversight

We return, finally, to a concern we mentioned initially. *See supra* p. 4. Outside the national rulemaking context, federal courts customarily deal in situation-specific litigation, and do not engage long-term in grand scale supervision of an executive agency's administration of federal programs. *See Heckler v. Chaney*, 470 U.S. 821 (1985); *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990). We have read SMCRA's less-than-crystalline citizen suit authorization in that light. As the *Two-acres* panel commented: if the economy of the broad-gauged civil action to remedy a nationwide problem is attractive, there are nevertheless compelling reasons supporting Congress' apparent preference for locally-oriented adjudication. 725 F.2d at 1428. Here, for example, adjudication where mining operations are located would "allow[ ] the operators more easily to become involved," permit "consideration of site-specific factors," and "distribute[ ] more evenly the judicial workload." *Id.* at 1428-29; *see National Wildlife Fed'n*, 661 F. Supp. at 476 (citing *Two-acres*, Kentucky district court dismissed an action brought under § 520(a)(2) alleging nationwide failure by federal and state regulatory authorities to administer and enforce SMCRA; court held that § 520(c)(1) applied to (a)(2) suits); *cf.* 30 U.S.C. § 1201(f) (referring to "diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations").

Our examination of cases against regulators for failure

to perform as mandated, whether under SMCRA, the FWPCA, or the Clean Air Act, reveals that the complaints commonly focus on the Secretary's conduct with regard to a particular facility or particular state program. *See, e.g., Golden Gate Audubon Society v. Army Corps of Engineers,* 700 F. Supp. 1549 (N.D. Cal. 1988) (FWPCA (a)(2) suit regarding failure to assert jurisdiction over wetlands adjacent to San Leandro Bay); *National Resources Defense Council, Inc. v. New York Dep't of Environmental Conservation,* 700 F. Supp. 173 (S.D.N.Y. 1988) (Clean Air Act (a)(2) suit challenging EPA Administrator's failure to require revision of state implementation plan); *Citizen for a Better Environment v. Costle,* 515 F. Supp. 264 (N.D. Ill. 1981) (Clean Air Act (a)(2) suit regarding Illinois and Indiana state implementation plans). We came upon no reported case, under any of these acts, in which another court has allowed an environmental group to maintain a citizen suit as far-reaching as SOCM's.[16]

Conclusion

Resolving the close statutory construction question this case presents, we hold that Congress, in SMCRA § 520(c)(1), 30 U.S.C. § 1270(c)(1), established a special, nonwaivable forum rule for all citizen suits. Whether the complaint is against mine operators directly ("(a)(1)" actions) or against official enforcers ("(a)(2)" suits), the case may be maintained only in a district in which questioned mining activity is located.

Our decision does not reach back to the consent decree entered in 1985 in conformity with the original settlement agreement. The parties before us have not questioned that decree, which expired by its own terms in 1990. NCA, we note, believed that its members' interests were not "adversely affected" by the litigation leading up to the

[16]The more traditional pattern we found is particularly noteworthy in view of the cases holding that the (c)(1) provisions in the FWPCA and the Clean Air Act do not limit (a)(2) suits under those Acts. *See supra* p. 13.

1985 decree until "rules promulgated in late 1988 and early 1989 broadened the operation of the AVS." Brief of Appellants National Coal Association and American Mining Congress at 5 n.1. The proper forum for challenges to 1988 and 1989 national rules is indeed the District of Columbia, *see supra* pp. 17-18; NCA, accordingly, is pursuing in this district challenges to the rules alleged to cause its aggrievement. *National Wildlife Fed'n v. Lujan*, No. 88-3117 (D.D.C.).

We cannot countenance, however, the renewal of the citizen suit in the District of Columbia in 1989 and the ensuing district court decree approving the second settlement agreement. Based on our resolution of the scope of SMCRA § 520(c)(1), 30 U.S.C. § 1270(c)(1), in this direct appeal, we vacate the district court's September 5, 1990 order. Taking account of the unsettled question of the breadth of SOCM's standing, *see supra* p. 10, and this opinion's indication of the need to alter the dimensions of the suit, we think dismissal without prejudice, rather than transfer, is in order. *See* 28 U.S.C. § 1631. We do not think it appropriate to occupy our district court, given these circumstances, with the task — likely to spark controversy — of determining whether, how, and where to transfer the case. We note, finally, in view of the Secretary's defense of the second settlement agreement as "fair, reasonable and consistent with law," that nothing in this opinion precludes OSM's maintenance and improvement of the AVS, and adherence to the agreement's terms, as a matter of official policy.

For the reasons stated, the district court's order, filed September 5, 1990, is vacated and the case is remanded with instructions to dismiss the action, without prejudice to further proceedings elsewhere.

It is so ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 81-2134-AER

SAVE OUR CUMBERLAND MOUNTAINS, INC., *et al.*,
Plaintiffs,

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, *et al.*,
Defendants,

and

NATIONAL COAL ASSOCIATION and AMERICAN MINING CONGRESS,
Intervenors.

Dated: September 5, 1990

MEMORANDUM

This case concerns the enforcement of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C § 1201 *et seq.* ("SMCRA"), by the Secretary of the Department of the Interior (the "Secretary"), and more specifically the Office of Surface Mining ("OSM"). The long and tangled history of this litigation has lead to a carefully negotiated and comprehensive proposed settlement agreement ("the Agreement"), which the parties have placed before the Court for its approval.

As the parties neared a final text late last year, two coalitions of coal mining companies, the National Coal Association and the American Mining Congress ("NCA/AMC"), intervened to oppose approval. The Court also granted

amicus curiae status to the Interstate Mining Compact Commission ("IMMC"), an association comprised of seventeen coal mining states. The various parties have exhaustively scrutinized every detail of the Agreement through quite lengthy briefing. Having closely examined each argument against approval, the Court concludes that the Agreement is fair, reasonable and consistent with law. It will therefore approve the agreement and dismiss the case.

In examining and approving the Agreement, it is clear that the Court needn't determine the rights of the parties or the merits of [the] case. Rather, it should satisfy itself "that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties." *Metropolitan Hous. Dev. Corp. v. Village of Arlington Hts.*, 616 F.2d 1006, 1014 (7th Cir. 1980), *quoted in Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1127-28 (D.C. Cir. 1988). In addition, in a case such as this involving comprehensive statutory standards, the court ensures that approval is within its judicial power "simply by determining that the settlement is consistent with the statute the consent judgment is to enforce and fairly and reasonably resolves the controversy in a manner consistent with the public interest." *Citizens for a Better Environment*, 718 F.2d at 1128.

It is important to say first what the Agreement, once approved, is not. It is not an injunction, its terms belie any intention that it be one, and it will not be enforced as such. As the Court reads the Agreement, approval simply serves the purpose of stating that the Agreement is lawful and reasonable—that it comports with the dictates of SMCRA and the Administrative Procedure Act ("the APA"), 5 U.S.C. § 553, and meets the standards of the Constitution of the United States.

The arguments of NCA/AMC in particular are myriad, often overstated, and at times marked by a rhetorical flourish which did not prove especially helpful. Nonetheless, in the Court's view, plaintiffs and defendants successfully addressed each challenge in their papers. While the Court will not engage in a point by point discussion of NCA/AMC's claims, it will treat their core complaints appropriately below.

I. The Agreement and State Primacy

NCA/AMC and IMMC both allege that the Agreement violates the SMCRA principle of state primacy. The Agreement implements currently valid rules governing the issuance and rescission of mining permits. It also requires the Secretary to enter into Memoranda of Understanding with mining states regarding the use of the Applicant/Violator System ("AVS"). Much of NCA/AMC's and IMMC's argument belongs, and is strenuously advocated, in the so-called "Rules" cases. To the extent the Agreement goes beyond applicable rules, the Court is satisfied that the action it contemplates for the Secretary with respect to the states is consistent with SMCRA section 521(a), 30 U.S.C. § 1271(a). Given this provision, the "primacy" contemplated by the statute does not necessarily translate to the "exclusivity" sought by intervenors and to a lesser extent by *amicus*. Our Circuit has pointed out that the "ultimate responsibility for guaranteeing effective state enforcement of uniform nationwide minimum standards lies with the Secretary . . . ." *In re Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 523 (D.C. Cir. 1981). In this light, the Agreement plainly does not violate state primacy.

II. The Agreement and the Administrative Procedure Act

NCA/AMC next complain that the Agreement constitutes rulemaking subject to the notice and comment requirements of the APA. The Court agrees with the Secretary

that the Agreement primarily contains two types of provisions: those implementing existing standards and those which contemplate the creation of new standards. The former type requires no rulemaking. With respect to the latter category, the Agreement obligates the Secretary to engage in future rulemaking and the APA will therefore be satisfied at a later time.

Section One relates to the development of the AVS. It clearly incorporates existing standards. Although NCA/AMC believe the computer will contain and trigger action upon ownership and control relationships different than those set out in existing regulations, the Agreement provides otherwise. The computer shall identify relationships "which meet the requirements of 30 C.F.R. § 773.5 . . . ." Agreement ¶ 1.3. Additionally, the terms "operator" and "permitting action" are defined by reference to the statute and regulations. Finally, the Secretary is correct to point out that the manner in which he *structures* the system is purely a matter of "agency organization, procedure, or practice" to which the notice and comment requirements of the APA do not apply. *See* 5 U.S.C. § 553(b)(3)(A).

Section Two deals with information collection. It relies upon sources which add no new burden on industry. The provision that OSM "consider" collecting other information must be carried out using governmental sources, its own investigation or by reviewing company records "to the extent allowed by applicable law." Agreement ¶ 2.5.

Section Three relates to state use of the AVS and the Memoranda of Understanding discussed above. It expressly provides for future rulemaking *prior* to the implementation of most of its provisions. Other provisions in this Section simply are not "rules." For example, Attachment A exempts three provisions from future rulemaking. Under paragraphs 3.1, 3.1.1 and 3.1.3, the Secretary must require the states to use the AVS, review certain files therein to verify applicant ownership and control statements and ad-

dress all potential links to violations. These requirements can be found in existing regulations. *See* 30 U.S.C. §§ 1260(b)(1), (c) and 30 C.F.R. §§ 773.15(b)(1), and (c)(1) (regulatory authority must use "available information" before issuing permit and find that linked violations are corrected, are being corrected or subject to appeal).

The Court is also persuaded that Section Six of the Agreement merely incorporates the standards of the "improvidently issued permit" rules, 30 C.F.R. §§ 773.20, 773.21, 843.21. Much is made of the requirement in paragraph 6.7 that OSM take "effective remedial action consistent with 30 C.F.R. § 843.21(d)," while that regulation simply calls for "appropriate" action. NCA/AMC is correct that some types of enforcement may well be effective and at the same time entirely inappropriate. It seems rather clear that any inappropriate, though effective, remedial action taken under the Agreement would be subject to challenge *under the rule*, which provides the standard which "effective" action must be judged. Lastly, NCA/AMC challenge the lack of concrete standards governing the manner in which violator link determinations may be rebutted. In the ownership and control rules, the Secretary has chosen a case-by-case analysis in this regard, and claims that this method is not lawful must be addressed in the "Rules" case.

Section Seven deals with individual civil penalties, consistent with the provisions of 30 U.S.C. § 1268(f) and 30 C.F.R. §§ 846.5, 846.12(b). No new standards are imposed. Indeed, paragraph 7.2 provides that OSM must proceed "in accordance with" the Individual Civil Penalty regulations, and that "prior to any final ICP assessment [an individual] shall be afforded due process of the law, in accordance with 30 C.F.R. § 846.17." Finally, though OSM wishes to shift the burden of going forward with evidence to the individual, the Agreement provides for future rulemaking before it will do so.

Section Ten provides for a dispute resolution mechanism for conflicts which arise between the parties under the Agreement. It is largely a continuation of the mechanism found in Judge Parker's 1985 Amended Order, and does not alter the substantive or procedural rights of third parties. Affected parties retain any remedies against OSM action they might otherwise have by regulation of statute.

Lastly, NCA/AMC's arguments that Sections Eleven and Twelve require notice and comments are also without merit. Section Eleven's requirement that OSM make certain net worth determinations available to plaintiffs remains limited by the Privacy Act, 5 U.S.C. § 552a. Section Twelve permits the OSM to suggest and negotiate better methods of achieving the goals of the Agreement and addresses possible changes in the applicable law. These provisions are procedural, as well as merely contemplative of possible future action. The application in the future might well result in substantive alteration of applicable standards, but they do not presently constitute rulemaking.

III. The Agreement and Due Process

NCA/AMC believe that portions of Sections Three, Six and Nine deprive them of property without due process of law. They first point to the use of the term "link" in Sections Three and Six as unconstitutionally vague. The term is defined as an "ownership and control relationship[] which meet[s] the requirements of 30 C.F.R. § 773.5." Agreement ¶ 1.3. The Court believes that NCA/AMC's "confusion" actually stems from its disagreement with the ownership and control rules, which are allegedly over-expansive and which rely to some extent on case-by-case analyses. These claims will be determined in good time in the "Rules" cases. The clear equation of the term with the ownership and control rules and the set of examples found at paragraph 1.3, however, is more than adequate to pass constitutional muster.

The Court has addressed the effect of Section Ten above. The procedures therein do not and cannot prejudice the due process rights of third parties, as the Agreement expressly provides. The 1985 Amended Order's terms are actually improved with respect to third party rights. In the Court's judgment, Section Ten is entirely consistent with due process in the abstract, as well as with existing administrative procedures.

IV. Delegation of Authority

The Agreement does not unlawfully delegate power to a private party, plaintiffs. It is clear from paragraph 1.4 of the Agreement that OSM retains responsibility for the manner in which the AVS computer system is developed. More generally, the Secretary retains full overall discretion under the Agreement by reserving the right to render a final decision following Section Ten dispute resolution procedures.

The other provisions to which NCA/AMC point as unlawful delegations simply do not read as such. One example is paragraph 2.2.n.5, which NCA/AMC characterize as requiring the Secretary to accept information provided by plaintiff outside the computer system. Instead, the Agreement provides for OSM *verification* of the information before its acceptance and use by the agency. No unlawful delegation appears from such a scheme.

NCA/AMC also contend that the Agreement, if approved, would violate the principle of separation of powers because the Court would have interfered with the Secretary's discretion and interjected itself into matters beyond its equitable powers. This argument assumes in part that the Agreement is by its terms illegal, something the Court has already rejected. Moreover, the Court's role, previously extensive under the 1985 Amended Order, is substantially curtailed. The dispute resolution procedures of Section Ten require plaintiffs to initiate new litigation if unsatisfied with the Secretary's final decision. OSM retains all juris-

diction and venue defenses it might otherwise have in such an action. It is difficult to see, therefore, in what manner the Court might overstep its equitable power.

V. Conclusion

After examining each provision of the Agreement, hundreds of briefing pages and the dozens of specific arguments by intervenors and *amicus* in opposition to approval, the Court concludes that the Agreement is entirely in accord with SMCRA, the APA and constitutional mandates. It is a fair and reasonable compromise and rationally carries out the purposes behind SMCRA and the rules promulgated by the Secretary thereunder. The Agreement will receive the Court's approval, and this case will be dismissed.

An appropriate Order accompanies this Memorandum.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action 81-2134-AER

SAVE OUR CUMBERLAND MOUNTAINS, INC. *et al.*,
Plaintiffs,

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, *et al.*,
Defendants,

and

NATIONAL COAL ASSOCIATION and AMERICAN MINING CONGRESS,
Intervenors.

Dated: September 5, 1990

ORDER

Upon consideration of the joint motion of the parties under Fed. R. Civ. Pro. 41 to approve the Settlement Agreement Between Save Our Cumberland Mountains, Inc. *et al.* and Manuel Lujan, Jr., Secretary, United States Department of the Interior, *et al.* (the "Agreement") and to dismiss the above-captioned case, and upon consideration of the Brief in Opposition to the Agreement of the National Coal Association and American Mining Congress, as well as the *amicus curiae* brief of the Interstate Mining Compact Commission, it is by the Court this 5th day of September, 1990,

ORDERED, that the Agreement be and hereby is APPROVED by the Court; and it is

FURTHER ORDERED, that this matter be and hereby is DISMISSED.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 81-2134

SAVE OUR CUMBERLAND MOUNTAINS, INC., et al.,
Plaintiffs,

v.

JAMES G. WATT, et al.,
Defendants

Dated: September 30, 1982

MEMORANDUM OPINION AND ORDER

In this action, two Appalachian-based nonprofit environmentalist organizations, Save Our Cumberland Mountains, Inc. and the Council of Southern Mountains, Inc., seek declaratory and injunctive relief against the Secretary of the Interior (Secretary) and the Director of the Office of Surface Mining Reclamation and Enforcement (OSM). The plaintiffs claim that Department of Interior officials have failed to assess and collect mandatory civil penalties and take appropriate enforcement actions against surface coal mine operators who have been found in violation of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. §§ 1201 *et seq.*

Defendants have moved to dismiss on grounds that venue is improper in this judicial district. They assert that this action cannot be brought in this district because the mining operations violative of the Act for which penalties have not been collected are not located in the District of Columbia. Defendants also assert that the complaint fails to

state a claim for which relief may be granted because imposition of the penalties sought by the plaintiffs is an action within the government's discretion. The parties have briefed and orally argued the motion to dismiss with respect to the venue provision and have also briefed the issue whether the assessment of penalties is mandatory or discretionary.

For the reasons set forth below the Court concludes that the plaintiffs have established venue and jurisdiction in this Court and that defendants have a mandatory duty to impose the penalties prescribed by the Act.

I.

The Surface Mining Control and Reclamation Act is a comprehensive statute designed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202. Section 520 of the Act, 30 U.S.C. § 1270, provides for two types of private actions: subsection (a)(1) authorizes citizen suits against anyone "alleged to be in violation of the provisions of this chapter or of any rule, regulation, order or permit issued pursuant thereto . . ."; subsection (a)(2) authorizes suits against a regulatory authority, including the Secretary for failure "to perform any act or duty under this chapter which is not discretionary . . . ."

"In addition, section 520(c)(1) provides that the appropriate venue for actions "respecting a violation of this chapter or the regulations thereunder may be brought only in the judicial district in which the surface coal mining operation complained of is located." Defendants argue that venue is improper in this district since the violative surface mining operations are located not within the District of Columbia but, rather, within the Appalachian region.

Although defendants suggest otherwise, section 520(c) is a venue, not a jurisdictional, provision. As such, it re-

lates solely to the convenience of the litigants. *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 560 (1967); *Olberding v. Illinois Central Railroad Co.*, 346 U.S. 338, 340 (1953). Moreover, it is generally appropriate to interpret a venue statute so as to allow the plaintiffs to choose their forum. *See Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 508 (1947).

With these guidelines in mind the government's argument must fail. The plaintiffs challenge the Secretary's decision not to assess penalties under section 518(h) of the Act. The Secretary's decision is allegedly nationwide in scope, affecting 700 or more violations. Clearly, it would not be more convenient to any party if plaintiffs were required to refile this suit in Virginia, Kentucky or elsewhere, when the challenged action took place here in Washington, D.C. and affects surface coal mines throughout the United States.

Rejection of the impractical result sought by the government need not rest on a contorted reading of section 520(c). That venue provision refers to actions involving only individual coal mines. It provides that: "Any action respecting a violation of this Act or the regulations thereunder may be brought only in the judicial district *in which the surface coal mining operation complained of is located*" (emphasis added). In this case, plaintiffs challenge a purported national policy under the Act, not 700 individual decisions involving particular coal mining operations.[1]

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[1] This case is distinguishable from a recent ruling of Judge Richey of this Court finding that venue was improper in this district under section 520(c) of the Act. *Save Our Cumberland Mountains v. Watt*, No. 81-2238 (D.D.C. July 6, 1982). There, plaintiffs claimed that the Secretary of the Interior failed to inspect and enforce against mining and reclamation operations alleged to be in excess of two acres and failed to collect monies owed by mining operators to the Abandoned Mine Reclamation Fund. The Court held that individual lawsuits should be brought in the district of each mining operation because "the par-

Professor Moore has cautioned that "venue limitations should not be made a fetish." 1 J. Moore, Moore's *Federal Practice* ¶ 0.140 [1.-1](2s ed. 1976). The defendants' interpretation of the venue provision makes no sense in this case and is not required under a straightforward reading of section 520(c). Thus, this Court must turn to the general venue statute, 28 U.S.C. § 1391(b), which provides venue within this district as the place where the claim arose.

II.

The substantive issue in this case is whether section 518 of the Act imposes a mandatory or discretionary duty on the Secretary to assess penalties for a cessation order issued under section 521(a)(3). If section 518 imposes a discretionary duty, then dismissal of this action is appropriate since section 520(a)(2), the jurisdictional provision relied upon by the plaintiffs, confers jurisdiction solely over suits to compel the Secretary to perform a mandatory duty. If, on the other hand, section 518 imposes a mandatory duty, then the jurisdictional requirement is satisfied.

The enforcement provisions of the Act are found in section 521, 30 U.S.C. § 1271. When the Secretary has reason to believe that a mining operation contains a serious violation of the Act or the operator's permit—i.e., one which

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ticular facts of each mining or reclamation operation might dictate a different result in each instance." The Court was apparently, and reasonably, concerned that a determination of whether a site exceeds two acres and a determination of the reclamation fees appropriate for each operator are dependent upon information about each particular site.

In this case, however, the facts of each violative operation are not relevant. The issue here is whether the Secretary's duty to impose civil penalties is discretionary or mandatory. This Court is concerned with the nature of the Secretary's duty, not with the conditions at each of the operations collectively referred to in the complaint. Site-specific facts are relevant not to this lawsuit but, rather, to the administrative process invoked after issuance of the assessment.

creates "imminent danger to the health or safety of the public" or "can reasonably be expected to cause significant, imminent environmental harm"—the Secretary must immediately order cessation of mining activities. Section 521(a)(2), 30 U.S.C. § 1271(a)(2). If, however, the violation does not create an imminent danger to the public or to the environment, then the Secretary must issue a notice of violation fixing a reasonable time for the abatement of the condition. Section 521(a)(3), 30 U.S.C. § 1271(a)(3). If the mine operator fails to abate the condition within the specified time, the Secretary "shall immediately order a cessation of surface coal mining and reclamation operations on the portions thereof relevant to the violation." *Id.*

This lawsuit is concerned with the civil penalties which follow the issuance of a "failure-to-abate" cessation order. The plaintiffs rely on the mandatory language contained within the relevant portions of the penalties section of the statute. Section 518(a) states:

> [A]ny permittee who violates any permit condition or who violates any other provision of this title, may be assessed a civil penalty by the Secretary, except that if such violation leads to the issuance of a cessation order under section 521, the civil penalty *shall* be assessed.

30 U.S.C. § 1268(a) (emphasis added).

In addition, section 518(h) reiterates and specifies the mandatory penalty for failure-to-abate cessation orders:

> Any operator who fails to correct a violation for which a citation has been issued under section 1271(a) of this title within the period permitted for its correction . . . *shall* be assessed a civil penalty of not less than $750 for each day during which such failure or violation continues.

30 U.S.C. § 1268(h) (emphasis added).[2]

The word "shall" in these two provisions suggest that the duty to which it applies is mandatory. *See, e.g., Association of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977). Nevertheless, the government argues that the assessment of penalties for failure-to-abate cessation orders is discretionary. The Secretary asserts that the statutory scheme "viewed as a whole" supports the conclusion. He points to the elaborate administrative review process available to a mine operator who seeks to challenge the order or the assessment. *See* 30 U.S.C. §§ 1268(b), (c), 1271(a)(5), 1275; 43 C.F.R. Part 4.[3] A mine operator might utilize these procedures to challenge the validity of a notice of violation or cessation order or the amount of the penalty. If so, the Secretary might decide not to proceed with a notice of violation during a minesite hearing or before an administrative law judge. The Secretary might also decide not to appeal from an adverse administrative law judge's ruling. Such examples of prosecutorial discretion, the Secretary argues, suggest that the Secretary must also have discretion in the assessment of penalties.

The Secretary's position lacks merit. Nothing in the administrative review procedures provide that the Secretary

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[2] The regulations contain similar mandatory language:

> [W]henever a violation contained in a notice of violation or a cessation order has not been abated within the abatement period set in the notice or order or as subsequently extended pursuant to Section 521(a) of the Act, a civil penalty of not less than $750 shall be assessed for each day during which such failure to abate continues . . . .

30 C.F.R. § 723.15(b).

[3] The Secretary's explanation of these statutory and regulatory provisions is nearly identical to that provided the Court and quoted at length in United States v. Hill, 533 F.Supp. 810 (E.D. Tenn. 1982). It does not, therefore, warrant repetition.

need not assess a penalty upon an operator who receives a failure-to-abate cessation order. Although the order or assessment might not withstand the rigors of administrative review, the Secretary cannot rely on the possibility of an adverse outcome as an excuse for failing to take the first step in the penalty process required by the statute.

The Secretary also offers a number of reasons why the relief sought by the plaintiff, even if supported by the statute and regulations, should nonetheless be denied on grounds of practicality. For instance, the notices of violation were mostly issued in 1979 and 1980 and might now be impossible to enforce. Similarly, section 518(c), 30 U.S.C. § 1268(c), requires that the Secretary inform the operator of the proposed assessment within 30 days of issuance of the notice of violation or cessation order; the Secretary's failure to comply with the 30-day requirement may bar collection of the penalties.[4] Finally, he notes that enforcement efforts might not be "cost-effective."

The Court is unconvinced that the cost of enforcement or likelihood of success is a concern which warrants endorsement of the Secretary's failure to comply with the explicit requirements of the statute. The plaintiffs seek only the performance of mandatory duties in the manner specified by the statute. The Secretary cannot convert a mandatory duty into a discretionary one simply by deferring it for a lengthy period of time.

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[4] The Secretary notes, however, that he has adopted the position in other litigation that failure to comply with the 30-day requirement does not bar imposition of a penalty absent the operator's showing of actual prejudice. *Sahara Coal Co.*, Interior Board of Surface Mining and Reclamation Appeals No. 81-31 (Nov. 30, 1981); *Badger Coal Co.*, Interior Board of Surface Mining and Reclamation Appeals No. 80-16 (July 24, 1980).

III.

The plaintiffs also seek enforcement of a regulation, 30 C.F.R. § 723.15(b)(2), which requires the Secretary to take enforcement measures following assessment of a penalty. It provides:

> Such penalty for the failure to abate a violation shall not be assessed for more than 30 days for such violation. If the permittee has not abated the violation within the 30-day period, the Office shall take appropriate action pursuant to sections 518(e), 518(f), 521(a)(4) or 521(c) of the Act within 30 days to ensure that abatement occurs or to ensure that there will not be a reoccurrence of the failure to abate.

The defendants have not focused on this regulation in their memoranda in support of the motion to dismiss. Because of the foregoing ruling that the duty under section 518 is mandatory, however, it follows that the enforcement measures under this regulation are also mandatory.

IV.

Although the sole dispositive motion before the Court in this case is defendants' motion to dismiss, the Court is of the view that the foregoing has fully addressed the substantive issues in this case. The only remaining question is the manner for proceeding with the assessment of penalties and enforcement of 30 C.F.R. § 723.15(b)(2).

The Court will enter judgment for the plaintiffs and require the plaintiffs to submit an appropriate order consistent with this Memorandum Opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 81-2134

SAVE OUR CUMBERLAND MOUNTAINS, INC., et al.,
Plaintiffs,

v.

JAMES G. WATT, et al.,
Defendants

Dated: September 30, 1982

O R D E R

In accordance with the accompanying Memorandum Opinion, it is this 30th day of September, 1982,

ORDERED that defendant's motion to dismiss is denied; and it is

FURTHER ORDERED that judgment is entered for the plaintiffs and they shall file an appropriate order within five days of this date; and it is

FURTHER ORDERED that the Court shall retain jurisdiction over this matter.

/s/ Barrington D. Parker
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-2134

SAVE OUR CUMBERLAND MOUNTAINS, INC., *et al.*,

Plaintiffs,

v.

JAMES G. WATT, *et al.*,

Defendants.

Dated: December 29, 1982

ORDER DENYING RECONSIDERATION

On September 30, 1982, this Court issued a Memorandum Opinion and Order granting judgment to the plaintiffs. It was held that section 518(h) of the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. §§ 1201 *et seq.*, required the Secretary of the Interior to assess and collect mandatory civil penalties for coal mining operators found in violation of the Act. The Court further held that 30 C.F.R. § 723.15(b)(2) required the Secretary to take certain enforcement measures. The Court ordered the plaintiffs to submit a proposed order.

Following that submission, the government filed a motion for reconsideration of the Court's judgment and, in addition, objected to the plaintiffs' proposed order.

Motion for Reconsideration

The government makes several arguments in its motion for reconsideration. First, it attaches the affidavit of James

Harris, Director of the Office of Surface Mining Reclamation and Enforcement and a defendant in this action, which states that the government has completed a program of penalty assessment for operators who are the subject of this proceeding. Thus, the government seeks to dismiss as moot the portions of plaintiffs' complaint concerning the assessment of civil penalties. Second, the government contends that the Court incorrectly concluded that venue was proper in this Court. Third, defendants assert that because plaintiffs had not filed a motion for summary judgment, granting of judgment in their behalf was inappropriate.

The government's mootness argument is limited in scope. The motion does not seek reconsideration of the basic holding of the September 30th Opinion and Order—namely, that § 518(h) imposes a mandatory duty upon the Secretary of the Interior to assess civil penalties against coal mine operators. Indeed, the government's proposed order, filed with its motion for reconsideration, includes such a declaration. It clearly would be unavailing for the government to allege that the Court lacked jurisdiction over the proceeding when the government had contended, throughout this litigation, that section 518(h) imposed discretionary, rather than mandatory duties upon the Secretary. Voluntary cessation of illegal conduct renders a case moot not only if there is no reasonable expectation that the wrong will be repeated. *De Funis v. Odegaard*, 416 U.S. 312 (1974); *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *Commonwealth of Virginia ex rel. Coleman v. Califano*, 631 F.2d 324, 326 (4th Cir. 1980). In view of the Secretary's position throughout this litigation, the Court clearly could have had no such reasonable expectation.

Thus, the only issue presented by the government's claim of "mootness" is whether, in light of the Secretary's compliance with the statute, injunctive relief is necessary to ensure that the defendants do not resume their flouting of sections 518(h). In light of the Secretary's three-year

disregard for the statute and regulations, this Court concludes that injunctive relief is entirely appropriate.

The government's argument as to venue has already been addressed at length and rejected. The affidavit in support of its motion adds nothing to an earlier filing and, in fact, provides considerable support for the Court's ruling. The government's position throughout this litigation has been that venue is lacking in this District because of the necessity for "site-specific" determinations in the penalty process. The Harris affidavit, however, makes clear what the defendants had argued all along—namely, that the huge majority of penalties can be assessed without reference to any "site-specific" factors.[1] The government's further description of "site-specific" factors related to compliance with 30 C.F.R. 723.15(b)(3) also lacks support. While that section provides the Secretary with discretion in selecting an appropriate enforcement action under 30 C.F.R. § 723.15(b)(2), the issue in this proceeding is the Secretary's failure to take *any* action under that regulation.

Finally, the Secretary argues that the Court erred in entering judgment for the plaintiff prior to the filing of

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[1] The Harris affidavit recites that 1,196 failure-to-abate cessation orders were issued pursuant to § 521(a)(3), and, of those, assessments were mailed for all but 97. Harris Aff. (Oct. 15, 1982) at § 7. For the remaining orders, assessments were not mailed because 1) the operator is deceased or has filed for bankruptcy, or 2) the cessation order expired automatically pursuant to § 521(a)(5), or 3) OSM lacked jurisdiction over the operation, or 4) the practice initially deemed a violation was actually in compliance with all permit conditions and provisions of the Act, or 5) the underlying notice of violation was not properly served. *Id.* Although the affidavit does not provide details on these factors, it would seem that none of the non-assessed violative operations contained characteristics requiring, as the government seeks, dismissal of this action in favor of re-filing in the judicial district of an individual mining operation. In any event, OSM could have easily discovered any "site-specific" defect in a cessation order during an administrative review. Thus, it approaches the disingenuous for the government to now argue that the Court erred in its determination of the venue question.

motions for summary judgment. As the September 30th ruling stated, judgment was entered because the government, in seeking dismissal of this action, had thoroughly briefed the underlying substantive legal issue—namely, whether the Secretary's duties under § 518 and 30 C.F.R. § 723.15(b)(2) are mandatory or discretionary. Although it has moved for reconsideration, the government has not identified even one factual dispute which should have precluded judgment for the plaintiffs. Because the controlling legal issue was fully briefed, and no issues of material fact existed, the government was not prejudiced by the Court's procedure for disposition of this case.[2] The government's argument is therefore rejected.

On the basis of the foregoing the government's request for reconsideration and other relief is denied. After review of the alternative orders proposed by the parties, the Court determines that the plaintiffs' order more effectively fulfills the requirements of the statute and regulation and is consistent with the Memorandum Opinion and Order of September 30, 1982. Entry of that order will follow.

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

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[2] The government, in a letter to the Court dated December 10, 1982 submitted for consideration a recent decision reversing the *sua sponte* award of summary judgment, United States v. Thompson Brothers Coal Co., Inc., No. 82-5241 (3rd Cir. Nov. 29, 1982). There is ample precedent in this circuit, however, for such an action. See Kennedy v. Whitehurst, 509 F.Supp. 226, 231-32 (D.D.C. 1981), aff'd 690 F.2d 951 (D.C. Cir. 1982). *See also* Hoffa v. Fitzsimmons, 673 F.2d 1345, 1361-62 (D.C. Cir. 1982); Federal Food Service, Inc. v. Donovan, 658 F.2d 830, 831 (D.C. Cir. 1981); Viles v. Claytor, 481 F.Supp. 465, 469-70 (D.D.C. 1979). *Cf.* Sibley Memorial Hospital v. Wilson, 488 F.2d 1338, 1343-44 (D.C. Cir. 1973).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1224

SAVE OUR CUMBERLAND MOUNTAINS, INC.,
COUNCIL OF SOUTHERN MOUNTAINS, INC.

v.

WILLIAM P. CLARK, in his official capacity as Secretary of the Interior, *et al.*, APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 81-2134)

Argued September 26, 1983

Decided January 20, 1984

Roger Marzulla, Attorney, U.S. Department of Justice, for appellants. *Carol E. Dinkins*, Assistant Attorney General, and *Robert L. Klarquist*, *Alfred T. Ghiorzi*, and *Jennele M. Morris*, Attorneys, U.S. Department of Justice, and *Harold P. Quinn, Jr.*, Attorney, U.S. Department of Interior, were on the brief for appellants.

Brent N. Rushforth, with whom *L. Thomas Galloway* and *Nancy C. Crisman* were on the brief, for appellees.

Before TAMM and WILKEY, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: This is an appeal from a district court order compelling the Secretary of the Interior (the Secretary) and the Director of the Office of Surface Mining (the Director) to enforce the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. §§ 1201-1328 (Supp. V 1981). Because we find that the district court erred in ruling that venue was properly in this district, we reverse.[1]

I. FACTS

The Surface Mining Control and Reclamation Act of 1977 is a comprehensive statute designed to control and remedy the effects of surface coal mining operations. The Secretary of the Interior is primarily responsible for administering and implementing the provisions of the Act. The dispute in this case concerns the Secretary's duty to take enforcement action against persons that he has determined are violating the Act.

Two environmental citizen groups, Save Our Cumberland Mountains, Inc. and Council of Southern Mountains (hereinafter referred to collectively as SOCM), filed this action on September 8, 1981. They alleged that the Secretary and the Director had failed to assess mandatory penalties against over 700 mine operators that had been cited for violations of the Act.[2] SOCM further asserted

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[1] This case was consolidated for purposes of oral argument and decision with case number 83-1008, Save Our Cumberland Mountains, Inc. v. Clark, also decided today.

[2] The enforcement provisions relevant to this case are outlined in sections 518 and 521 of the Act. 30 U.S.C. §§ 1268, 1271 (Supp. V 1981). When the Secretary determines that a

that the Secretary had violated his own mandatory regulation by failing to initiate enforcement actions against hundreds of mine operators that continued to violate the Act after expiration of a 30-day penalty period.[3] Jurisdiction for the action was based on section 520(a)(2) of the Act, which authorizes citizens' suits against the Secretary for failure to perform nondiscretionary duties. 30 U.S.C. § 1270(a)(2). In addition, the complaint alleged jurisdiction under 28 U.S.C. §§ 1331, 1337, 1361, 2201, and 2202 (1976 & Supp. V 1981).

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mine operator is violating the Act, he is required to issue either a cessation order (CO) or a notice of violation (NOV). Issuance of an NOV or a CO triggers the enforcement mechanism. If the Secretary has issued an NOV, he may assess a civil penalty. 30 U.S.C. § 1268(a). If the Secretary has issued a CO, however, the Act provides that he "shall" assess a civil penalty. *Id.* An operator who fails to abate a violation within the time period allowed by the NOV or CO "shall be assessed" an additional civil penalty (known as a failure to abate penalty) of at least $750 for each day the violation remains unabated. 30 U.S.C. § 1268(h).

[3] The regulation limits the assessment of the $750 per day failure to abate penalty to a period of 30 days after expiration of the initial abatement period prescribed in the NOV or CO. The regulation further provides: "If the permittee has not abated the violation within the 30-day period, the Office shall take appropriate action pursuant to sections 518(e), 518(f), 521(a)(4) or 521(c) of the Act within 30 days to ensure that abatement occurs or to ensure that there will not be a reoccurrence of the failure to abate." 30 C.F.R. § 723.15(b)(2) (1982).

The appropriate action referred to includes the suspension or revocation of permits. Section 521(a)(4), 30 U.S.C. § 1271(a)(4). The Secretary may also request the Attorney General to initiate a civil action to enjoin operation of the violating mine. Section 521(c), 30 U.S.C. § 1271(c). Operators who willfully or knowingly violate the Act are subject to criminal fines or imprisonment. Section 518(e), 30 U.S.C. § 1268(e). Finally, section 518(f) subjects corporate directors and officers to fines, penalties and imprisonment for violations by corporate entities. 30 U.S.C. § 1268(f).

The Secretary moved to dismiss the action asserting that the specific venue provision in section 520(c)(1) of the Act, 30 U.S.C. § 1270(c)(1), precludes venue in this district. The Secretary further alleged that the district court lacked jurisdiction because his duty to assess penalties and enforce the Act is entirely discretionary.

The Secretary's motion to dismiss was denied. The district court ruled that the specific venue provision in section 520(c)(1) applied only to actions involving individual coal mines and not to actions, such as this one, that challenged a purported national policy. The court ruled that venue was properly in this district under the general venue statute, 28 U.S.C. § 1391. *Save Our Cumberland Mountains, Inc. v. Watt*, 550 F. Supp. 979, 980-81 (D.D.C. 1982). The district court then concluded that the Secretary's duty to collect civil penalties and initiate alternative enforcement is mandatory. Finding no issues of fact remaining, the court entered judgment for the plaintiffs. *Id.* at 983.

The Secretary brought this appeal. He contends that the specific venue provision in section 520(c)(1) governs this action and thus venue is improper in this district. We agree that the specific venue provision is applicable to the claim in this case and, accordingly, we reverse the district court's decision.[4]

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[4] The Secretary raises two other arguments on appeal. First, he disputes the district court's ruling that he has a mandatory duty to implement alternative enforcement procedures when a violation is not abated within the allotted time period. (He admits, for purposes of this case, that the duty to assess civil penalties is mandatory. *See* Brief for Appellants at 25-26). Second, he asserts that the district court erred in entering summary judgment for SOCM without a proper motion. Since our decision on the venue issue is dispositive, we need not address these claims of error.

II. Discussion

In our decision today in *Save Our Cumberland Mountain, Inc. v. Clark*, No. 83-1008, we concluded that all actions against the Secretary for failure to perform duties required by the Surface Mining Control and Reclamation Act are governed by the specific venue provision in section 520(c)(1) of the Act. That decision controls our disposition of this case. We incorporate that decision's discussion of the applicability of the specific venue provision into this opinion.

Under the specific venue provision, any claim alleging a violation of the Act or its regulations must be brought in the district where the mine operation complained of is located.[5] Here, SOCM alleges that the Secretary failed to perform duties required by the Act and its regulations because he failed to assess civil penalties and initiate enforcement proceedings against mines that he determined were violating the Act. A claim that the Secretary has failed to perform a duty required by the Act is, in essence, a claim that he has violated the Act. By its terms, therefore, the venue provision applies to the claim in this case.

SOCM raises two principal arguments in support of its position that the specific venue provision does not apply to this claim. First, it argues that the venue provision applies only to actions brought against individual mining operators pursuant to section 520(a)(1) of the Act and not to actions against the Secretary for failure to perform nondiscretionary duties under section 520(a)(2).[6]

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[5] The venue provision, found in the citizens' suit section of the Act, provides: "Any action respecting a violation of [this Act] or the regulations thereunder may be brought only in the judicial district in which the surface coal mining operation complained of is located." 30 U.S.C. § 1270(c)(1).

[6] Under section 520(a)(1), citizens may bring suits against any entity that is allegedly in violation of the Act. Section

Second, it contends that the provision does not apply if jurisdiction for the claim alleged is not based solely on the citizens' suit section of the Act.

These arguments were discussed fully in case number 83-1008, *Save Our Cumberland Mountains, Inc. v. Clark.* There, we found that the plain language of the venue provision evidences an intent that it be applied broadly. We thus concluded that the venue requirement applies to actions against the Secretary under section 520(a)(2) of the citizens' suit provision. We also determined that there is no evidence of a congressional intent to limit application of the provision where jurisdiction for the claim is derived from a source other than the citizens' suit section of the Act. Since SOCM's arguments raise no new issues, we dispose of them summarily.

SOCM further contends that venue is appropriate in this district because the action challenges a nationwide policy of nonenforcement and does not "complain of" the violations committed by specific mines. We reject this assertion for two reasons. First, SOCM's argument ignores the venue provision's broad language. In enacting this provision, Congress chose to restrict venue in "*[a]ny* action respecting a violation of [this Act]. . . ." 30 U.S.C. § 1270(c)(1) (emphasis added). It did not choose to selectively limit venue depending on either the scope of the claim or the relief requested. We cannot restrict the plain meaning of the statutory language. Second, even though SOCM "complains of" noncompliance by the Secretary, the claim is ultimately concerned with violations and abatement activities at specific mines. Site specific issues can easily become important to SOCM's claim. In fact, the district court's most recent order requires the Secretary to report on the environmental conditions at specific sites and to describe both the corrective actions

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520(a)(2) authorizes private persons to bring actions against the Secretary (or other regulatory authority) for failure to perform a nondiscretionary duty under the Act.

taken to relieve any harm and the results of those actions. First Supplemental Order, Joint Appendix at 494-95. Thus, we disagree with SOCM's assertion that venue is more appropriate in this district.

Under section 520(c)(1), the proper venue for this action is the judicial district in which the cited mine operations are located.[7] Since none of these mines is located in the District of Columbia, venue is improper in this district. We therefore conclude that the district court erred in ruling that venue for this action was properly in this district. Accordingly, we must reverse.

Before closing we note that at least on one occasion this circuit has declined to reverse a district court decision for lack of venue. In *Whittier v. Emmet*, 281 F.2d 24 (D.C. Cir. 160), two individuals brought suit pursuant to the Tucker Act, 28 U.S.C. § 1491, to recover money from the United States. On appeal, this court ruled that the district court had erroneously determined that venue was proper in this district. The panel concluded, however, that improper venue was harmless error because there was no prejudice to either party. *Id.* at 30-31. The only real substantive issue in *Whittier* was whether the plaintiffs were entitled to prejudgment interest. As the court noted, it made no real difference to the Government where the issue was litigated.

We do not find the reasoning in *Whittier* applicable here. We cannot conclude in the instant case that the Secretary suffered no prejudice by litigating the claim in this district. As we noted earlier, there are potential site specific issues involved in this case. Moreover, to find that the venue ruling was harmless error would undermine any policies Congress may have sought to promote when

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[7] We recognize that there may be no one single district in which venue is proper. Thus, the claim may have to be severed. *See* Sharp Electronics Corp. v. Hyman Cash Register Co., 655 F.2d 1228, 1230 (D.C. Cir. 1981).

it chose to restrict venue in "[a]ny action respecting a violation of [the Act]. . . . 30 U.S.C. § 1270(c)(1). *See United States v. Maryland Casualty Co.*, 573 F.2d 245, 247-48 (5th Cir. 1978). Thus, we conclude that the district court's decision must be reversed.[8]

III. Conclusion

We conclude that the specific venue provision in section 520(c)(1) of the Act precludes venue in this district. Accordingly, the district court's decision is reversed.

It is so ordered.

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[8] We note that since the time this case was argued, the Department of Interior and Related Agencies Appropriations Act of 1984, Pub. L. No. 98-146, 97 Stat. 919, was signed into law. The House and Senate reports accompanying the two versions of this Appropriations Act specifically noted the appropriation of funds to enable the Department of the Interior to comply with the terms of the district court's order. H.R. Rep. No. 253, 98th Cong., 1st Sess. 40-41 (1983); S. Rep. No. 184, 98th Cong., 1st Sess. 40 (1983). The Conference Report accompanying the final version of that Act also noted that it expected the Department to comply with the district court's order with the appropriated funds. H.R. Rep. No. 399, 98th Cong., 1st Sess. 20 (1983). We emphasize that we take no position regarding the impact, if any, of today's decision on Congress's action. We also note that our decision today does not preclude the district court from considering a transfer of this case to an appropriate district court pursuant to 28 U.S.C. § 1406(a) (1976). *See* Sharp Electronics Corp. v. Hayman Cash Register Co., 655 F.2d 1228 (D.C. Cir. 1981).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1991
CV 81-02134

No. 90-5374

SAVE OUR CUMBERLAND MOUNTAINS, INC., et al.
v.
Manuel Lujan, Secretary of the Interior, et al.

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

Appellee's Suggestion For Rehearing *En Banc* and the responses thereto have been circulated to the full Court. No member of the Court requested the taking of a vote. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPREE, CLERK
BY:
Robert A. Bonner
Deputy Clerk

STATUTE INVOLVED

Section 520 of SMCRA states:

(a) Except as provided in subsection (b) of this section, any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this Act—

(1) against the United States or any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution which is alleged to be in violation of the provisions of this Act or of any rule, regulation, order or permit issued pursuant thereto, or against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this title; or

(2) against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this Act which is not discretionary with the Secretary or with the appropriate State regulatory authority.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties.

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice in writing of the violation (i) to the Secretary, (ii) to the State in which the violation occurs, and (iii) to any alleged violator; or

(B) if the Secretary or the State has commenced and is diligently prosecuting a civil action in a

court of the United States or a State to require compliance with the provisions of this Act, or any rule, regulation, order, or permit issued pursuant to this Act, but in any such action in a court of the United States any person may intervene as a matter of right; or

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice in writing of such action to the Secretary, in such manner as the Secretary shall by regulation prescribe, or to the appropriate State regulatory authority, except that such action may be brought immediately after such notification in the case where the violation or order complained of constitutes an imminent threat to the health or safety of the plaintiff or would immediately affect a legal interest of the plaintiff.

(c) (1) Any action respecting a violation of this Act or the regulations thereunder may be brought only in the judicial district in which the surface coal mining operation complained of is located.

(2) In such action under this section, the Secretary, or the State regulatory authority, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any of

the provisions of this Act and the regulations thereunder, or to seek any other relief (including relief against the Secretary or the appropriate State regulatory authority).

(f) Any person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this Act may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district in which the surface coal mining operation complained of is located. Nothing in this subsection shall affect the rights established by or limits imposed under State Workmen's Compensation laws.

30 U.S.C. § 1270 (1988).